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OF THE SEVERAL STATES.

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CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

GILMORE v. KNIGHTS OF COLUMBUS.

[77 Conn. 58, 58 Atl. 223.]

BENEFIT ASSOCIATIONS—Enlargement of Prohibited Risks. A fraternal benefit association may reserve the right to amend its list of prohibited occupations, and the enlargement of such list by including the occupation of a switchman as extrahazardous is reasonable and valid. (p. 20.)

BENEFIT ASSOCIATIONS—Extrahazardous Occupation—Forfeiture of Insurance.—One who becomes a member of a fraternal benefit organization under an express agreement that he is to forfeit his membership if he engages in any occupation which is then, or may thereafter be deemed, extrahazardous, is bound by a reasonable amendment subsequently made by the association to its list of extrahazardous occupations so as to include the occupation in which he is engaged, although such amendment contains no provision making it retroactive. (p. 20.)

J. E. McConnell, for the appellant.

A. P. Tanner and H. W. Rathbun, for the appellee.

TORRANCE, C. J. The defendant is a fraternal benefit society organized under the laws of this state, of which, in his lifetime, Dennis W. Gilmore, now deceased, was an insurance member. To him it issued what is called an endowment voucher, entitling his beneficiary conditionally, upon Gilmore's death, to the sum of one thousand dollars. The plaintiff is his beneficiary, and brought this suit to recover that sum. The defendant refused to pay, on the ground that Gilmore at the time of his death was engaged in the occupation either of "freight brakeman" or of "switchman," contrary to the rules of the society; and that by reason thereof nothing was due to the plaintiff.

It appeared by the evidence that Gilmore became a member of the defendant society in November, 1899. At that time its by-laws put the occupation of "freight brakeman" in the list of occupations known as extrahazardous; but the occupation of "switchman" was not then in that list. In June, 1900, the by-laws of the defendant were amended so as to include the occupation of "switchman" in the list of extrahazardous occupations. One of the important questions⁶⁰ in the trial below was whether Gilmore was affected by that amendment. The defendant had offered evidence tending to show that at the time of his death Gilmore was engaged in the occupation either of "freight brakeman" or of "switchman"; and that he began such occupation about March 1, 1901, and was killed while engaged therein in the month of April, 1901. The defendant asked the court, in effect, to charge the jury that if they found that Gilmore, at the time of his death, was engaged in the occupation of "switchman," their verdict should be for the defendant. The court refused to so charge; and, on the contrary, charged in effect that the amendment did not affect Gilmore. The only errors assigned upon this appeal are that the court erred in refusing to charge as requested, and in charging upon the point in question as it did.

The application made by Gilmore at the time he was admitted to membership was laid in evidence, and it contained, among others, the following provisions: "That if I engage in any occupation which shall be deemed extrahazardous or prima facie extrahazardous, by the board of directors, or their successors, I shall thereby forfeit my membership in the order together with all payments made by me. . . . That I shall conform to and abide by the constitution, by-laws, rules and regulations, of said order, and of any council thereof, of which I may at any time be a member, which may now be in force, or which may at any time hereafter be adopted by the proper authorities, or submit to the penalty now or hereafter provided for the breach or violation of such constitution, by-laws, rules or regulations." It also contained a statement that his occupation was that of "fireman." He was then a fireman in a mill. The endowment voucher was also laid in evidence, and it contained, among others, the following statement relating to Gilmore: "He is therefore, by these presents and by virtue of the laws and rules of the order, hereby declared to be possessed of all the

advantages and responsibilities imposed by said or future laws or rules thereof, during his continuance of legal membership therein." Certain parts of the by-laws of the defendant were also laid in evidence, ⁶¹ containing among others, the following provisions: "Sec. 196. No person shall be admitted as an insurance member of the order or he or his beneficiaries receive any benefits therefrom, whose occupation is extrahazardous, or prima facie extrahazardous, or is deemed by the board of directors to be extrahazardous or prima facie hazardous. . . . Sec. 197. Any insurance member who shall thereafter engage in any occupation deemed prima facie extrahazardous by the board of directors shall ipso facto forfeit his membership in the order and his beneficiaries have no claim against the order for death benefits."

The vote of the directors, passed June 26, 1900, putting the occupation of "switchman" in the list of extrahazardous risks, was also laid in evidence. It merely showed that at a meeting of the board of directors "the list of extrahazardous risks as revised is as follows," followed by the list including "switchman" and other occupations not theretofore upon it; and that it was "Voted, That the list of extrahazardous risks be adopted."

It thus appears in the application made by Gilmore, that he agreed not only not to engage in any occupation then deemed extrahazardous by the then directors, but also not to engage in any occupation which should be deemed hazardous by "their successors"; and that he would not only conform to the laws and rules of the defendant then in force, but also to those "which may at any time hereafter be adopted by the proper authorities." His endowment voucher was based not only upon the then existing laws and rules of the order but also upon "future laws or rules thereof." Section 196 of the by-laws provides that no person shall be admitted as an insurance member whose occupation is in the extrahazardous list; and section 197 provides that any admitted member who shall "thereafter engage" in any occupation deemed to be extrahazardous shall ipso facto forfeit his membership in the order.

These provisions contained in the application, endowment voucher, and by-laws, clearly show that the defendant reserved the right to amend its list of prohibited ⁶² occupations in the future as against Gilmore, and his agreement to be bound by such future amendments. Under such

circumstances the courts are substantially agreed that a future amendment, if reasonable, binds the consenting member, although they may differ as to whether a given amendment of this kind is a reasonable one: Supreme Lodge K. of P. v. La-Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838; Supreme Lodge K. of P. v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Thibert v. Supreme Lodge K. of H., 78 Minn. 448, 79 Am. St. Rep. 412, 81 S. W. 220, 47 L. R. A. 136; Pain v. Société St. Jean Baptiste, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502; Supreme Commandery K. of G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 322; Parish v. New York Produce Exchange, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; Masonic Mutual Benefit Assn. v. Severson, 71 Conn. 719, 43 Atl. 192.

In the case at bar we think the amendment made in June, 1900, was a reasonable one, and the court below so held and properly so held. It also properly held that the amendment was duly made by proper authority; and about this no question was made in the court below.

The court told the jury that Gilmore, in his application, had agreed to be bound by future amendments, and that he would be bound by the amendment here in question, "provided the same was passed in such a manner and form as to give it a retroactive effect"; but that there was nothing in the case to show that the defendant intended to have the amendment apply to those who then were members.

Upon this ground, alone, the court as matter of law instructed the jury, in effect, that if, after the passage of the amendment, Gilmore entered upon the occupation of "switchman" he did not thereby forfeit his rights of membership.

In so charging we think the court erred. The court appears to have held that the amendment was intended to operate only in the future, mainly because it contained no words indicating that it was to operate upon those already members. Notwithstanding this, we think the amendment was intended to affect those who were members when it was passed.

Gilmore had expressly agreed to be bound by such an amendment, and so presumably had all his fellow members of that time; and a provision in the amendment that it should⁶³ apply to them was unnecessary, and would have been superfluous. They had agreed that it should apply to them and there is nothing in the vote to indicate that it was the in-

tention of the directors that it should not. Again, it is the aim of the society that the benefits and burdens of its insured members shall be equal; but this equality would, in some measure, be destroyed by making old members subject to one set of rules and new members to another; and an intention to bring about such a state of things is not apparent in the amendment here in question. Reading that amendment in the light of the circumstances in which it was passed, we think the court should have told the jury that their verdict should be for the defendant if they found that Gilmore had engaged in the occupation of "switchman" after the passage of the amendment.

There is error and a new trial is granted.

In this opinion the other judges concurred.

The Effect of Changes in the By-laws of beneficial associations as against pre-existing members is discussed in the monographic note to *Strauss v. Mutual Reserve etc. Assn.*, 83 Am. St. Rep. 706-720. Members of an association who have stipulated in their contract of membership to comply with the laws of the society then in force or which may thereafter be adopted, are bound by subsequent reasonable amendments to a by-law in force when they became members: *Chambers v. Knights of Maccabees*, 200 Pa. St. 244, 86 Am. St. Rep. 716. However, the power reserved by an association to make changes in its by-laws warrants only reasonable variances in its contracts with members, and not such as are destructive of vested rights: See *Wuerfler v. Trustees Grand Grove*, 116 Wis. 19, 96 Am. St. Rep. 940. See, also, *Langnecker v. Trustees Grand Lodge*, 111 Wis. 279, 87 Am. St. Rep. 860; *Peterson v. Gibson*, 191 Ill. 365, 85 Am. St. Rep. 263.

WHITTLESEY v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

[77 Conn. 100, 58 Atl. 459.]

MASTER AND SERVANT—Fellow-servants.—A foreman of a railroad section gang and one of his men are fellow-servants. (p. 24.)

MASTER AND SERVANT—Section Gang—Fellow-servants.—If a railroad company provides a suitable handcar for its section gang of men, properly equips them with signal flags, and supplies a sufficient number of competent men to properly perform the work, it is not required to see that such flags are used when necessary. That is the duty of the men, all of whom, including their foreman, are fellow-servants. (p. 24.)

MASTER AND SERVANT—Section Gang—Fellow-servants.—A foreman of a railroad section gang and one of his men are fellow-servants, and the negligent failure of such foreman to use a signal flag when necessary, resulting in injury to one of such men, does not render the railroad company liable therefor. (p. 24.)

C. B. Whittlesey, for the appellant.

W. C. Noyes, for the appellee.

¹⁰⁰ HALL, J. 'The plaintiff's intestate, Sylvester Sullivan, was employed by the defendant as a section-hand in a gang of laborers, one of whom was a foreman, stationed on the line of defendant's railroad and engaged in keeping the roadbed in repair. The foreman of the gang, one Dwyer, worked with the other laborers of the gang, kept their time, and, in the absence of the roadmaster, directed their work, but had no power to hire or discharge them except in emergencies. ¹⁰¹ The roadmaster had the direction and supervision of the work done by section gangs in his division, and reported to the superintendent, who reported to the general officers of the company. It was the duty of the gang to report every morning, at the station where the tools were, and where a handcar was kept for the use of the gang to transport themselves and their tools when their work was distant from the station, and the men thereafter became subject to the orders of their foreman, who directed when and how the handcar should be used, and, when upon it, directed how it should be operated. The train dispatcher did not control the running of handcars.

On the morning in question, while Sullivan and the other section hands were riding upon the handcar with the foreman at the latter's order, and moving west toward the point on the road where they were to work that day, the handcar was struck by a freight train which came around a curve running in an opposite direction, and which, unknown to Dwyer, was that morning about twenty minutes behind its usual time of passing that point. The occupants of the car, upon seeing that a collision would occur, made every reasonable effort to escape injury, but Sullivan fell and was run over by the freight train and killed.

The court finds that reasonable care required that when a handcar was running upon the track a man should be sent ahead with a flag to signal trains; that the car, which was a suitable one, was properly provided with flags for that purpose, and that the collision was caused by the negligence of Dwyer, who was a competent foreman, in not so protecting the handcar.

The argument of the plaintiff's brief seems to be that in sending out the handcar Dwyer was performing a duty sim-

ilar to those of a train dispatcher, and therefore one which the company owed to its employés, as was held in *Darrigan v. New York etc. R. Co.*, 52 Conn. 285, 52 Am. Rep. 590, and that the defendant is consequently liable to the plaintiff for the negligence of Dwyer in ordering the handcar started while the freight train was approaching from the opposite direction on ¹⁰² the same track; or is liable because of its negligent failure to adopt proper rules as to when handcars might be run upon its tracks.

This argument overlooks the fact that no such negligence is charged in the complaint. In his pleadings the plaintiff finds no fault with the rules of the company, nor with the act of Dwyer in ordering the handcar to be started under the circumstances. The failure of the defendant "to protect said handcar while running on said track from all other trains by flags or other signals" is the only breach of duty alleged, and the only alleged cause of the accident. The only question, therefore, for our consideration is whether the duty of causing a flag to be sent ahead to signal approaching trains, while the handcar was proceeding along the track, was one of those duties which the defendant company was required to perform as a master or principal, or one which rested upon Dwyer merely as a fellow-servant with Sullivan; and this question is to be determined rather by the nature of the neglected duty than by the comparative rank of the negligent servant and the person injured.

At the time of the collision these section hands, including Sullivan and Dwyer, were engaged in the work of keeping a portion of the defendant's roadbed in repair. One of their duties in connection with this work was to transport themselves and their tools, by a handcar, to the point where such repairs were to be made. This part of their work was necessarily rendered somewhat hazardous by the danger of injury from approaching trains. To perform it with reasonable safety required a signal flag to be sent ahead of the handcar. It was the duty of the railroad company to exercise reasonable care to provide these men with suitable means and appliances for so signaling approaching trains. Having performed that duty, nothing further was required of the defendant in order to render the place where the men were working reasonably safe. It then became the duty of the men to use the means provided for the safe and proper performance of their work. The act of carrying forward a sig-

nal flag was one which the men were competent to perform,¹⁰³ and it was the duty of Dwyer to order it to be done, just as it was his duty to direct the performance of other details of the work in which they were all engaged.

The defendant provided a suitable handcar, properly equipped with signal flags, and a sufficient number of competent men for the proper performance of the work. Having done this it was not required to see that the flag was used when necessary. That was a duty of the servants, the negligent failure of Dwyer to perform which was the negligence of a fellow-servant of Sullivan, for the consequences of which the defendant is not liable: *Kelly v. New Haven Steamboat Co.*, 74 Conn. 343, 347, 92 Am. St. Rep. 220, 50 Atl. 871, 57 L. R. A. 494; *Sullivan v. New York etc. R. Co.*, 62 Conn. 209, 215, 25 Atl. 711; *McQueeney v. Norcross*, 75 Conn. 381, 387, 53 Atl. 780, 54 Atl. 301.

In directing a judgment for nominal damages in the case of *Nolan v. New York etc. R. Co.*, 70 Conn. 159, 194, 39 Atl. 115, 43 L. R. A. 305, this court virtually sustained the decision of the superior court, that the failure of the defendant's brakeman on a freight train to go back the required distance to flag an approaching special train, by which a collision was caused and an employé of defendant on the special train killed, was the negligence of a fellow-servant of the injured person, for which the railroad company was not liable.

In *Northern Pacific R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. Rep. 843, 40 L. ed. 994, and in *Clifford v. Old Colony R. Co.*, 141 Mass. 564, 6 N. E. 751, it was held that the foreman of a section gang on a railroad, by whose negligence in the management of a handcar one of the section hands upon it was injured in a collision, was a fellow-workman with the injured person, for whose negligent act the company was not liable.

There is no error.

In this opinion the other judges concurred.

Whether a Foreman of a Section Gang on a railroad is a fellow-servant with the men under his direction is discussed in the monographic note to Mast v. Kern, 75 Am. St. Rep. 632-634.

The Duty of a Railway Company to use reasonable diligence to warn its trainmen of a known obstruction on its track cannot be delegated to a fellow-servant of the trainmen so as to absolve the company from liability for an injury resulting from the negligence of the fellow-servant in failing to warn trainmen of the obstruction: Rogers v. Cleveland etc. Ry. Co., 211 Ill. 126, 103 Am. St. Rep. 185.

DOUGLASS v. UNMACK.

[77 Conn. 181, 58 Atl. 710.]

LEGAL PROCESS—Attack on Validity—Estoppel.—The defense that legal process is void, when set up by the person procuring or using it, after it has affected another injuriously who makes demand for reparation, can be supported only when the defect relied on is of the most glaring character, such as lack of jurisdiction or the like. (p. 26.)

ESTOPPEL to Attack Validity of Legal Process.—A statutory provision that no writ of replevin shall issue until a sufficient recognizance with surety has been taken by "the authority signing the writ," is intended for the sole benefit of the defendant. An unsuccessful plaintiff in replevin, who has seized goods belonging to the defendant, is estopped together with his surety, in an action upon the recognizance, from alleging, or being benefited by, the fact that it was entered into before a magistrate other than the one who signed the writ of replevin. (p. 28.)

C. S. Hamilton, for the appellant.

W. H. Ely and E. Zacher, for the appellees.

¹⁸² BALDWIN, J. General Statutes, section 1057, provides that no writ of replevin shall be issued "until some person, known to the authority signing the writ to be of sufficient responsibility, has entered into a recognizance before him, with at least one sufficient surety, in a sum at least double said sworn value of said property, conditioned that the plaintiff shall prosecute his suit to effect, and for the payment of any judgment that may be recovered by the defendant in the suit, and for the return of the property to him, and payment to him of all damages sustained by the replevy thereof, if the plaintiff fail to establish his right to its possession, a record of which recognizance shall be entered at the foot of the writ, before the same is issued; and copies of the process left in service shall contain said affidavit and said recognizance." A writ of replevin in favor of the defendant Unmack, as a receiver in bankruptcy, was signed by James E. O'Connor, the other defendant, as a magistrate, at the ¹⁸³ foot of which was a record of a recognizance which had been entered into before another magistrate, by Unmack as principal and the other defendant as surety. The recognizance was in the statutory form (Gen. Stats., sec. 1058), except that it was not taken before or signed by the same magistrate who signed the writ.

Under claim of authority by virtue of this process, the plaintiff's goods were taken from him by a proper officer.

The case was subsequently tried in the court of common pleas before which the writ was returnable, and judgment rendered for the return of the goods, and that the then defendant (and present plaintiff) recover of Unmack, as receiver, six hundred and fifty-five dollars damages, with costs. For his failure to comply with the terms of this judgment, the present suit is brought against Unmack and O'Connor, upon their recognizance.

The defense is that the recognizance was void, and therefore cannot serve as the foundation of an action.

The proceedings are few which can be treated as absolutely void by those procuring or conducting them, when they have affected others injuriously who make demand for reparation. A defense of such a nature can only be supported when the defect relied on is of the most glaring character, as in the case of causes brought before courts which have no jurisdiction to consider them: *Rosen v. Fischel*, 44 Conn. 371, 375.

The affidavit and recognizance required by statute as conditions precedent to the issue of a writ of replevin are required for the sole benefit of the defendant. He can take advantage of any defect in them; but the plaintiff has not an equal right: *Nichols v. Standish*, 48 Conn. 321.

In the replevin process now in question there were two serious irregularities. One was that the surety in the recognizance was the magistrate who afterward signed the writ. This was not apparent on the face of the papers, for there might have been two men of the name of James E. O'Connor. The other irregularity was that the recognizance was entered into before a magistrate who did not afterward sign the writ. Neither of these things destroyed the jurisdiction of the court over the replevin suit: ¹⁸⁴ *Orcutt's Appeal*, 61 Conn. 378, 384, 24 Atl. 276. That depended on the writ, and the writ supported it. True, the statute forbade the issue of the writ until a proper recognizance had been entered into; but in fact it was issued, and used to wrest from the present plaintiff goods which belonged to him. The want of a proper bond could have been pleaded in abatement. It was a matter which the defendant could have set up to defeat the suit, but it would not have justified erasing the cause from the docket on the motion of the plaintiff in replevin.

Nor does it now justify either him or his surety in asking that the obligation into which they voluntarily entered, and by means of which they gained possession of the goods of another, be treated as a mere nothing out of which nothing can come: *Walko v. Walko*, 64 Conn. 74, 78, 29 Atl. 343. The question is not to be decided by the rules applicable to recognizances exacted of a defendant in a cause, as a condition of his release from custody: *Ferry v. Burchard*, 21 Conn. 597; *Whittier v. Way*, 6 Allen, 288, 291. The recognizance in suit was voluntarily given to procure an advantage to the principal obligor. It was an incident of an action which was fully within the jurisdiction of the court before which it was brought. Such recognizances can be entered into before a justice of the peace. This recognizance was entered into before such an officer. To take such a recognizance is a ministerial, not a judicial, act: *Gregory v. Sherman*, 44 Conn. 466. It must be taken before the writ of replevin issues. If the magistrate who took it had proceeded to sign the writ, the proceeding would have been regular. The irregularity consisted in procuring the signature of the writ by another magistrate. For this both the defendants are directly responsible; for one of them signed it, and the other brought the suit.

If a de facto justice of the peace signs a writ and takes a recognizance upon it, the obligation is valid. It is valid simply because it is assumed before one who is openly exercising an authority which only belongs to a public officer, and whose title, so long as it is not challenged by a direct ¹⁸⁵ proceeding in behalf of the public, cannot be collaterally attacked in any private suit. For still stronger reasons, it is not open to these defendants to escape from an obligation into which they freely entered before a de jure magistrate, because, owing to their own acts, he did not afterward sign the writ of which it was an incident. As to them, under these circumstances, the statutory provision that the recognizance must be taken before the authority signing the writ may properly be regarded as directory.

The complaint alleged that the recognizance was taken before George E. Hall, a justice of the peace, but did not explicitly state that another magistrate signed the writ. On the trial, the record of the replevin suit being offered in evidence in support of the allegations, the court admitted it for certain purposes, but ruled that it did not tend to show that the defendants had entered into any recognizance.

In this, and in the virtual direction to the jury to return a verdict for the defendants, there was error. Whatever objections the defendant in the original action might have taken to the validity of the obligation, the present defendants stand on very different ground. The defects in it were such as they were equitably estopped from setting up; and whatever benefit the plaintiff could claim from the rules of equity, he could ask for under his complaint: Gen. Stats., sec. 532; *Plumb v. Curtis*, 66 Conn. 154, 173, 33 Atl. 998; *Canfield v. Gregory*, 66 Conn. 9, 17, 33 Atl. 536.

There is error, and a new trial is ordered.

In this opinion the other judges concurred.

On the Estoppel of the Defendant in a suit on a replevin bond to deny the validity of the bond, possession of the property having been taken thereunder, see *McFadden v. Fritz*, 110 Ind. 1, 10 N. E. 120; *Arthur v. Sherman*, 11 Wash. 254, 39 Pac. 670; *Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 130. Consult, also, *Capital Lumbering Co. v. Learned*, 36 Or. 544, 78 Am. St. Rep. 792; *Caffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126.

STATE v. STOCKFORD.

[77 Conn. 227, 58 Atl. 769.]

CONSPIRACY—Criminal.—A combination of persons for the accomplishment of a particular object may be criminal, either because the object itself is criminal in its character, or because the means by which that object is to be effected are criminal. (p. 30.)

CONSPIRACY TO STRIKE.—Whether a combination of workmen by concerted action to strike and leave the employment of their employers is lawful or criminal depends upon its object and the manner in which the strike is conducted. (p. 30.)

CONSPIRACY TO STRIKE.—A combination to cause a strike of workmen for the purpose of injuring and destroying the business and property of another, or of depriving another of his liberty or property, without just cause, is both unlawful and criminal. (p. 30.)

CONSPIRACY TO STRIKE.—A combination which contemplates the use of force, threats, or intimidation, to induce workmen to abandon together the service of their employers is criminal. (p. 31.)

CONSPIRACY TO STRIKE—Lawful Purpose.—Workmen may lawfully combine to accomplish their withdrawal in a body from the service of their employers, for the purpose of obtaining an advance in wages, a reduction in the hours of labor, or any other legitimate advantage, even though they may know that such action will necessarily cause injury to the business of their employers, provided such abandonment of work is not in violation of any continuing contract, and is conducted in a lawful manner, and not under such circumstances as to wantonly and maliciously inflict injury to person or property. (p. 31.)

CONSPIRACY—Criminal—Strikes.—A combination to compel workmen and others by threats and intimidation, to refrain from doing that which they have a legal right to do, is criminal. (p. 31.)

CONSPIRACY—Criminal—Strikes.—A combination of workmen to prevent their employers from carrying on business, and to ruin and destroy their business and property, is criminal. (p. 31.)

THREATS.—Words or Acts which are calculated and intended to cause an ordinary person to fear an injury to his person, business, or property, are equivalent to threats. (p. 31.)

CONSPIRACY—Criminal—Strikes.—The act of a combination of workmen in instructing pickets, or members in open meetings, to use violence to prevent workmen from continuing in the service of their employers, is unlawful and criminal. (p. 32.)

CONSPIRACY.—Evidence of Acts of Persons Accused of conspiracy and of their agents, in endeavoring to accomplish the purpose of the conspiracy, is admissible to show the manner in which it was designed to be accomplished, and, after prima facie proof of the alleged conspiracy, evidence of the acts and declarations of the individual conspirators is admissible. (p. 33.)

CONSPIRACY—Evidence.—If persons are accused of a conspiracy to prevent an employer from carrying on his business and to ruin and destroy it, evidence of the number of customers lost by such employer since the formation of such conspiracy is admissible. (p. 33.)

CONSPIRACY—Evidence.—If persons are accused of conspiracy to prevent an employer from carrying on his business, evidence that one of his workmen, who had been insulted by a conspirator, was afterward shot at while on duty, is admissible. (p. 33.)

CONSPIRACY—Evidence.—If a person accused of criminal conspiracy testifies that a labor union involved in such conspiracy had instructed its pickets to use no violence, evidence is admissible to show that such union had paid counsel to defend its men arrested for using violence. (p. 33.)

E. P. Arvine, E. J. Maher and J. M. Sullivan, for the appellants.

W. H. Williams, state's attorney, and A. N. Wheeler, assistant state's attorney, for the appellee.

²³⁵ HALL, J. The information alleges a combination of the defendants and others; the purpose to be effected by the combination; the acts by which that purpose was to be accomplished; and the performance of such acts. The allegations as to these subjects are the same in the several counts, excepting that two different agreements were presented to be executed, and that they were to be signed by different parties. By these allegations but a single offense is described in each count, namely, a criminal combination to procure a certain agreement to be signed by certain described methods.

²³⁶ A combination of persons for the accomplishment of a particular object may be criminal, either because the object

itself is criminal in its character, or because the means by which that object is to be effected are criminal: *State v. Gannon*, 75 Conn. 206, 210, 52 Atl. 727.

The agreements which the defendants sought to have signed contain no provisions which are contrary to the criminal law of this state, and if the only purpose of the combination was to procure these agreements to be entered into in order to advance the legitimate interests of the employés of the team owners and liverymen, without the view of injuring the business and property of their employers, such purpose was not criminal.

If the alleged purpose of the combination was not criminal, were the methods to be pursued criminal? It is alleged that the defendants maliciously conspired to compel the employers to sign the agreements. It is not alleged that it was intended to directly threaten the employers to induce them to sign the agreements, nor does it appear that they were directly threatened. The information states how they were to be compelled—and we think it is in effect alleged that they were to be compelled only by the particular methods described in the information—the first of which is by inducing the workmen, by concerted action, to strike and leave the employment of the employers named. Such a strike may be lawful, or it may be unlawful and criminal. Whether it is lawful or not depends upon its object and the manner in which it is conducted. A combination to cause a strike for the purpose of injuring and destroying the business and property of another, or of depriving another of his liberty or property without just cause, is both unlawful and criminal: 1 *Eddy on Combinations*, sec. 521 et seq.; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; *Plant v. Woods*, 176 Mass. 492, 498, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339; *State v. Stewart*, 59 Vt. 273, 289, 59 Am. Rep. 710, 9 Atl. 559; *State v. Huegin*, 110 Wis. 189, 85 N. E. 1046, 62 L. R. A. 700; *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802; *State v. Glidden*, 55 Conn. 46, 71, 3 Am. St. Rep. 23, 8 Atl. 890. A combination which contemplates the use of force, threats, or intimidation, to induce ²³⁷ workmen to abandon together the service of their employers, is criminal (authorities above cited), and a combination for that purpose is also criminal because it is to induce the commission of an offense which is made criminal by statute.

Workmen may lawfully combine to accomplish their withdrawal in a body from the service of their employers, for the purpose of obtaining an advance in wages, a reduction of the hours of labor, or any other legitimate advantage, even though they may know that such action will necessarily cause injury to the business of their employers, provided such abandonment of work is not in violation of any continuing contract, and is conducted in a lawful manner and not under such circumstances as to wantonly or maliciously inflict injury to person or property: 1 Eddy on Combinations, sec. 521; Rogers v. Evarts, 17 N. Y. Supp. 264; Farmers' Loan etc. Co. v. Northern Pac. R. Co., 60 Fed. 803, 25 L. R. A. 414.

A combination to use the second, third and fourth alleged methods of obtaining the execution of the agreements is a combination to compel workmen and others, by threats and intimidation, to refrain from doing that which they have a legal right to do, and is criminal. The use of such means is made a criminal offense by section 1296 of the General Statutes, which provides that "every person who shall threaten, or use any means to intimidate any person to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure, or threaten to injure, his property, with intent to intimidate him, shall be fined not more than one hundred dollars, or imprisoned not more than six months."

A combination to use the fifth alleged means, by preventing such employers from carrying on business and ruining and destroying their business and property, is equally criminal both at common law (see authorities above cited) and under the statute quoted.

The language or conduct which will constitute the unlawful use of threats or means to intimidate need not be such ²³⁸ as to induce a fear of personal injury. Any words or acts which are calculated and intended to cause an ordinary person to fear an injury to his person, business or property are equivalent to threats: State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Crump v. Commonwealth, 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; Rogers v. Evarts, 17 N. Y. Supp. 264; O'Neil v. Behanna, 182 Pa. St. 236, 61 Am. St. Rep. 702, 37 Atl. 843, 38 L. R. A. 382.

Upon the trial of the present case the contest appears to have been upon questions of fact rather than of law; upon

the question of whether violence, threats and intimidation were the means used and directed by the defendants to be used, rather than whether proof of those facts was necessary in order to convict. The evidence is not before us, but the record shows that witnesses testified that pickets were instructed in open meetings by several of the defendants to use violence to prevent workmen from continuing in the employ of the team owners and liverymen, and that such instructions were obeyed.

The court instructed the jury that the information charged a criminal conspiracy, and properly defined that offense in the language of the opinion in *State v. Gannon*, 75 Conn. 206, 52 Atl. 727; that the right of the defendants and others to strike or leave the service of their employer singly or in a body, even though they believed that the result of such action would be to bring the business of their employers temporarily to an end, and the right to meet together and counsel such action, were unquestionable; that if the only purpose of the strike was to procure better pay or shorter hours, the purpose was a lawful one, but that the defendants had no right to combine to accomplish such purpose by means of a crime; that if the real purpose of the strike was to ruin the employers' business by threats and intimidation, it was unlawful, and that a conspiracy for that purpose was a crime; that the stationing of pickets for the purpose of obtaining information as to the extent of the business of the person whom the picket was directed to watch was not unlawful; that it might be lawful to attempt to induce another to leave his employer's service by fair arguments, and, also, perhaps, ²³⁹ to station pickets to ascertain how such persons might be reached and lawful means employed to induce them to leave their employers' service; that it was the right of members of these unions and other drivers to refuse to drive their carriages at any time, and was lawful for the defendants to solicit the business which was being done by said team owners and liverymen, and to induce their customers by fair means to employ the defendants and their friends; but that a combination to do these things by threats and intimidation was a criminal combination, and that the placing of pickets to induce one to leave his employer's service by threats and intimidation was unlawful; but that the defendants should not be convicted for what some one else had done, but only for what they had themselves done; that the words "threat" and

"intimidation" had their ordinary meaning in the statute, and that for the purposes of this case a threat was a menace of such nature as to unsettle the mind of the person upon whom it operated.

Upon an examination of the entire charge we are satisfied that the defendants have no just cause of complaint, either upon the ground that the court failed to instruct the jury sufficiently fully upon the subjects embraced in their requests, or to fairly and properly present the case to the jury.

Evidence of acts of the accused and of their agents in endeavoring to accomplish the purpose of the conspiracy was admissible as evidence of the manner in which it was designed to be accomplished; and after prima facie proof of the alleged conspiracy, evidence of the acts and declarations of the individual conspirators was admissible: *State v. Thompson*, 99 Conn. 720, 726, 38 Atl. 868.

The testimony of the witnesses Norton and Donnelly was properly admitted. To render their testimony admissible the state was not required to first prove by direct evidence that the customers referred to had been solicited, by the defendants or their associates, to refrain from giving their patronage to the team owners. Whether the losses of custom were occasioned by such alleged acts were questions for the jury upon all the evidence.

²⁴⁰ For similar reasons the testimony of Coolman, that he was shot at, was admissible. The question was one of the weight and effect of his testimony in connection with the circumstances proved, as showing that the shooting was by a union man. The facts testified to were sufficient to warrant the court in leaving that question to the jury.

The questions asked the defendant Talmadge were proper in cross-examining him upon his testimony as to the purpose of the strike and the manner in which it was to be conducted.

The defendant Flynn having testified that the union instructed pickets to use no violence, it was proper cross-examination for the state to show the action of the union, when informed that violence had been used by their men; and, for that purpose, to show that the union had paid counsel to defend union men arrested for using violence.

The question asked the defendant Cornelius, in connection with the offer of the record of his conviction, was not for the purpose of proving the averments of the information, but to contradict, upon cross-examination, a material statement of

one of the defendants' witnesses. It was clearly admissible for that purpose.

Other rulings complained of in the reasons of appeal require no discussion.

There is no error.

In this opinion the other judges concurred.

In the Recent Monographic Note to Gray v. Building Trades Council, 103 Am. St. Rep. 488-503, will be found a discussion of the legal aspects of boycotting; and in the earlier note to O'Neil v. Behanna, 61 Am. St. Rep. 706-711, will be found a discussion of the law applicable to strikes and strikers. Unlawful trusts and monopolies are discussed in the extended note to Harding v. American Glucose Co., 74 Am. St. Rep. 235-273.

BRYAN'S APPEAL.

[77 Conn. 240, 58 Atl. 748.]

WILLS—Incorporation of Document by Reference.—In order that a document of any nature may become part of a will by reference, it must be in existence at the time of the execution of the will, and the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt as an existing document. (p. 38.)

WILLS—Incorporation of Document by Reference.—A reference in a will to an extrinsic document, so vague and ambiguous that it may be applied to any one of several documents then or thereafter written, is insufficient to incorporate such document in the will, and cannot be aided by parol evidence. (p. 39.)

WILLS—Incorporation of Letter by Reference.—If a clause in a will creates a trust "for the purposes set forth in a sealed letter which will be found with this will," the reference to the letter is so vague and ambiguous, that a sealed letter found with the will cannot by reference be incorporated in and become part of it. (p. 39.)

H. G. Newton, H. Hewitt and C. A. Towne, for the appellants.

H. Stoddard and W. H. Williams, for the appellees.

241 TORRANCE, C. J. The court of probate for the district of New Haven approved and admitted to probate a certain writing as the last will of Philo S. Bennett, deceased. That will contained, as its twelfth clause, the following: "I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (\$50,000), in trust, however,

for the purposes set forth in a sealed letter which will be found with this will." At the time this will was offered for probate there were also offered for probate as a part of it, under the twelfth clause of the will, two writings hereinafter referred to as exhibits "B" and "C."

The court of probate refused to approve or admit to probate as parts of said will each and both of these exhibits; and from that part of its decree an appeal was taken to the superior court, by William J. Bryan individually, and as trustee under the will as he claims it to be. The will admitted to probate is in the record called Exhibit "A"; while ²⁴² exhibits "B" and "C" are letters which, as the appellant claims, constitute a part of the will. The will was executed in New York, and is dated the twenty-second day of May, 1900.

Exhibit "B" is a letter from the testator to his wife, of which the following is a copy:

"New York, 5/22/1900.

"My Dear Wife:

"In my will just executed I have bequeathed to you seventy-five thousand dollars (75,000) and the Bridgeport houses, and have in addition to this made you the residuary legatee of a sum which will amount to twenty-five thousand more. This will give you a larger income than you can spend while you live, and will enable you to make bountiful provision for those you desire to remember in your will. In my will you will find the following provisions:

"I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will.

"It is my desire that fifty thousand dollars conveyed to you in trust by this provision shall be by you paid to William Jennings Bryan, of Lincoln, Nebr., or to his heirs if I survive him. I am earnestly devoted to the political principles which Mr. Bryan advocates, and believe the welfare of the nation depends upon the triumph of those principles. As I am not as able as he to defend those principles with tongue and pen, and as his political work prevents the application of his time and talents to money making, I consider it a duty, as I find it a pleasure, to make this provision for his financial aid, so that he may be more free to devote himself to his chosen field of labor. If for any reason he is

unwilling to receive this sum for himself, it is my will that he shall distribute the said sum of fifty thousand dollars according to his judgment among educational and charitable institutions. I have sent a duplicate of this letter to Mr. Bryan, and it is my desire that no one excepting you and Mr. Bryan himself shall know of this letter and bequest.²⁴³ For this reason I place this letter in a sealed envelope, and direct that it shall be opened only by you, and read by you alone. With love and kisses,

“P. S. BENNETT.”

Exhibit “C” was a typewritten duplicate of Exhibit “B,” except that the words “with love and kisses, P. S. Bennett,” at the end of Exhibit “B,” were not contained in Exhibit “C,” nor was Exhibit “C” signed by the testator.

Respecting these exhibits the appellant in the superior court offered evidence tending to prove the following facts: that about a week or ten days before the date of the will, at the city of Lincoln, Nebraska, the testator, and Mr. Bryan and his wife, prepared a blank draft form of the will, which was subsequently filled out and executed, and that Exhibit “C” was then also prepared as a blank draft form from which Exhibit “B” was to be, and was subsequently, drawn; that Exhibit “B” was in the handwriting of the testator, and was by him placed in a sealed envelope bearing the following indorsement in his handwriting: “Mrs. P. S. Bennett. To be read only by Mrs. Bennett, and by her alone, after my death. P. S. Bennett. [Seal]”; that the testator, on the day after the date of the will, placed said will and said envelope containing Exhibit “B” in his box in a vault in the Wool Exchange Building in New York City, where they remained as he put them until after his death, the will being “separate from said letter and said sealed envelope”; and that Exhibit “C,” from the time it was drawn up, remained in Bennett’s custody till his death, and was found soon after that event among his private papers, in an envelope subscribed in Bennett’s handwriting as follows: “Copy of letter in Safe Deposit Company vault, Wool Exchange.”

The appellant then offered Exhibit “C” in evidence as part of the will, claiming that it was the original and equivalent of the paper Exhibit “B,” “and that it was substantially the sealed letter referred to in paragraph 12 of the will.” The court excluded the evidence. The appellant thereupon of-

ferred in evidence, as part of the will, the letter Exhibit "B," and the court excluded it. The appellant also offered parol evidence tending to prove that Exhibit "B" was the instrument ²⁴⁴ to which reference was made in clause 12 of the will, but the court excluded such evidence. Subsequently the jury, under the direction of the court, rendered a verdict to the effect that exhibits "B" and "C" "are not either separately or together a part of the last will of said Philo S. Bennett, deceased"; and judgment followed in accordance with the verdict.

From the opinion of the trial court, which is made part of the record, the rulings of the court seem to have been based upon several distinct grounds, which may be briefly indicated: 1. Apparently upon the ground that the doctrine of incorporation by reference does not prevail as to wills, under our statute relating to their making and execution; 2. That even if that doctrine prevails here, no paper in the present will is by reference made a part of it, according to the rules universally applied in jurisdictions where the above doctrine prevails; and 3. That the letter, Exhibit "B," shows on its face an intent on the part of the testator that it should not constitute a part of his will.

As we think the rulings of the court below can be vindicated upon the second of the grounds above mentioned, it will be unnecessary to consider the other two grounds; but in thus resting our decision upon the second ground we do not mean to intimate that it could or could not be made to rest upon the first or third.

Before considering the second ground a word or two regarding the first ground may not be out of place. Under the rule prevailing in England, an unattested document may, by reference in a will, under certain conditions and limitations, become by such reference incorporated in the will as a part of it; and that too whether the document referred to is or is not a dispositive one; and one of the leading cases upon this subject is that of *Allen v. Maddock*, 11 Moore P. C. C. 427, decided in 1858. This is known as the doctrine of incorporation by reference; and the principle upon which it rests does not differ essentially from that which is applied in incorporating unsigned writings in a signed instrument so as to constitute a memorandum in writing under ²⁴⁵ the statute of frauds. The English rule appears to prevail in many of our sister states; but the question whether it pre-

vails in this state, and if so, with what limitations and under what conditions, was left undetermined in *Phelps v. Robbins*, 40 Conn. 250, and has never been passed upon since. In the present case we find it unnecessary to decide those questions; but for the purposes of the argument we shall assume, without deciding, that the doctrine of incorporation by reference in a will prevails here.

Two of the conditions, without the existence of which the English rule will not be applied, are concisely, but we think correctly, stated in *Phelps v. Robbins*, 40 Conn. 272, as follows: "First, the paper must be in existence at the time of the execution of the will; and, secondly, the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms." In a California case upon this subject this language is used: "But before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit and unambiguous as to leave its identity free from doubt": *Estate of Young*, 123 Cal. 337, 342, 55 Pac. 1011. In an important and well-considered English case, decided in 1902, the court uses this language upon this subject: "But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a writing existing—that is, at the time of the execution—in such terms that it may be ascertained. . . . The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document": *In the Goods of Smart*, [1902] L. R. P. D. 238.

Tested by the rules as thus laid down in the cases above cited, and in numerous others that might be cited, the will in the present case fails to comply with the required conditions under which incorporation by reference can take place in ²⁴⁶ the case of wills. In clause 12 of the will in question here a large sum of money is given to Mrs. Bennett "in trust, however, for the purposes set forth in a sealed letter which will be found with this will." There is not in the language quoted, nor anywhere else in the will, any clear, explicit, unambiguous reference to any specific document as one existing and known to the testator at the time his will

was executed. Any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody, at any time after the will was executed, and "found with the will," would each fully and accurately answer the reference; and if we assume that the reference calls for a letter from the testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is "so vague as to be incapable of being applied to any instrument in particular" as a document existing at the time of the execution of the will; "the vice is that no particular paper is referred to": *Phelps v. Robbins*, 40 Conn. 250, 273. Such a reference as is made in the present will is, in fact as well as in law, no reference at all; certainly it is not such a reference as the rules under the doctrine of incorporation by reference require in the case of wills.

A reference so defective as the one here in question cannot be helped out by what is called parol evidence; for to allow such evidence to be used for such purpose would be practically to nullify the wise provisions of the law relating to the making and execution of wills. We know of no case, and in the able and helpful briefs filed in this case have been referred to none, where a reference like the one here in question has been held to incorporate into the will some extrinsic document.

Assuming, then, without deciding, that the doctrine of incorporation prevails in this state, as claimed by the appellant, we are still of the opinion that the rulings of which he complains were correct.

There is no error.

In this opinion the other judges concurred.

A Paper may be Referred to and Made Part of a Will, if in existence when the will is made, and so referred to that it is susceptible of being identified from inspection or by the aid of parol or other evidence. But it seems that a paper, such as a letter, if not in existence when a will was executed, though written and signed at a later hour on the same day that the testament was made, cannot be admitted to probate as a part of the will: *In re Shillaber*, 74 Cal. 144, 5 Am. St. Rep. 433. See, also, *Bryan v. Bigelow*, 77 Conn. 604, post, p. 64, and note.

MARSH v. WHEELER.

[77 Conn. 449, 59 Atl. 410.]

PARTNERSHIP—Presumption as to Pledge of Credit.—The power of one partner to pledge the credit of the partnership in the emission of commercial paper is presumed, with respect to trading or commercial partnerships, and not presumed under ordinary conditions with respect to nontrading partnerships. (p. 41.)

PARTNERSHIP.—Trading or Commercial partnerships are those which buy or sell, but buying and selling need not be their sole purpose, nor even their most characteristic feature. A partnership, for a manufacturing or mechanical business is commercial or trading, although buying and selling in the market is only one of its incidents. (p. 41.)

PARTNERSHIP—Commercial.—Whenever the business of a partnership, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading or commercial partnership. (p. 41.)

PARTNERSHIP—Commercial.—If a partnership contemplates the periodical, continuous, or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured shape, it is a trading or commercial partnership. (p. 42.)

PARTNERSHIP—Commercial.—A partnership, whose conduct so involves buying and selling, whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit, and the usual instrumentalities of trade, and frequent contact with the commercial world in dealings which in their character and incidents are like those of traders generally, is a commercial or trading partnership. (p. 42.)

PARTNERSHIP—Commercial.—A partnership whose business is the taking and execution of plumbing contracts, and which makes frequent and extensive purchases and sales of fixtures and fittings in the fulfillment of its undertakings, is a commercial or trading partnership, although it conducts no store where articles bought are afterward sold. (p. 42.)

PRINCIPAL AND AGENT.—Notice to an agent to bind his principal, must be within the scope of the agent's employment, and notice to him of any fact outside the scope of his agency will not affect his principal. (pp. 42, 43.)

PRINCIPAL AND AGENT.—Notice to the employé of a bank of a fact not within the scope of his employment, and which he is under no duty to communicate to the bank, is not notice to the bank. (p. 43.)

J. C. Chamberlain, for the plaintiffs.

B. Wakeman, for the defendants.

452 PRENTICE, J. The question which naturally first presents itself in this case is as to whether or not the two notes bearing the name of C. B. Wheeler & Co., which the

plaintiffs ⁴⁵³ held at the time of the dissolution of said partnership, May 31, 1900, were, in the plaintiffs' hands, paper upon which Wheeler & Co. was obligated. It is conceded by both parties that any such obligation is, under the facts found, solely dependent upon authority in Charles B. Marsh to make and utter negotiable promissory notes in the name of the firm.

The plaintiffs contend that the articles of copartnership gave him express authority to that end. This the defendants deny. This claim, which rests upon a very slender foundation, may be disregarded.

Upon the question of implied authority the defendants rely upon the distinction recognized in *Pease v. Cole*, 53 Conn. 53, 55 Am. Rep. 53, 22 Atl. 681, between commercial or trading and nontrading partnerships, and the further distinction, also recognized in that case, between the two classes of partnerships, in that the power of one partner to pledge the credit of the partnership in the emission of commercial paper is presumed with respect to trading and not presumed under ordinary conditions with respect to nontrading partnerships. So far there is no difference between the parties as to the law, and as respects the legal consequences of the facts found there is such a concurrence of view that the question of implied power resolves itself into the narrow one as to the class of partnerships to which that of Wheeler & Co. belonged, to wit, whether it was a trading or nontrading one.

A trading partnership is one which buys and sells; but buying and selling need not be its sole purpose, nor even its most characteristic feature. A partnership for the conduct of a manufacturing or mechanical business is none the less a trading one for the reason that buying and selling in the market is only one of its incidents: *George on Partnership*, 92. In *Kimbro v. Bullitt*, 63 U. S. (22 How.) 256, 268, 16 L. ed. 313, the rule is stated as follows: "Wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership." Another statement of the principle is found in several authorities, to wit: "If the ⁴⁵⁴ partnership contemplates the periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured shape, it is a trading or commercial partnership": *Bates on Partnership*,

327; *Baxter v. Rollins*, 90 Iowa, 217, 48 Am. St. Rep. 432, 439, note, 51 N. W. 838; *Randall v. Merideth*, 76 Tex. 669, 13 S. W. 576.

But in whatever language the distinction between the two classes of partnerships is expressed, it is not to be forgotten that it is not a purely arbitrary one, but has an underlying reason and purpose which should not be overlooked when an application to any given situation is attempted. This reason and purpose have their origin in a need on the part of certain partnerships arising out of the kind and manner of their business, and the absence of such need on the part of others, and in the interest of the commercial world into contact with which the business of the one class brings it and that of the other does not: *Pease v. Cole*, 53 Conn. 53, 55 Am. St. Rep. 53, 22 Atl. 681; *Kimbrow v. Bullitt*, 63 U. S. (22 How.) 256, 16 L. ed. 313; *Holt v. Simmons*, 16 Mo. App. 97; *Story on Partnership*, sec. 102a. So it is with respect to those partnerships the nature of whose business naturally comprehends certain courses of dealing, that the law says that they belong to the class denominated commercial or trading. These are those whose conduct so involves buying and selling, whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit, and the usual instrumentalities of trade, and frequent contact with the commercial world in dealings which in their character and incidents are like those of traders generally.

If we turn now to the case of *Wheeler & Co.* we find a partnership whose business was the taking and execution of plumbing contracts. It conducted no store over whose counter articles it had bought were sold. Whatever buying and selling it did was that incident to the execution of plumbing contracts as a stated business. It is common knowledge, however, that the execution of plumbing contracts in these modern days involves extensive purchases in the market of ⁴⁵⁵ fixtures and fittings of large cost. These are not bought for use by the buyer, but to be disposed of for money. The value of that which is bought enters as a large factor into the receipts of the contractor. The value of labor necessary to the adaptation of the purchased articles to their intended uses will also become a factor. But that makes no difference. The sale is not required to be of the articles in the same form as when purchased.

It thus appears that the firm carried on a business which contemplated frequent and extensive purchases, not as incidental to an occupation or for use, but for the distinct purpose of selling again in an adapted or applied, if not the original, shape; and that its business, therefore, carried it frequently into the market and brought it into contact with the commercial world in transactions naturally involving the use of credit and the usual instrumentalities of trade. Its business being of such a character, it was a commercial or trading partnership within the meaning of that term as used in this connection.

In view of these conclusions the plaintiff's objection to the admissibility of testimony requires no consideration.

We have next to consider the validity in the plaintiffs' hands of the note sued upon, which is neither of those hereinbefore determined to have been valid, but the last of a series of renewals thereof. Marsh, at the time that this note was made and discounted, was not a partner of Wheeler. The firm of Wheeler & Co. had been dissolved some six months before its date, and before several of its predecessors in the line of renewal had been given. The plaintiffs, however, had no notice of the dissolution, unless the same was inferable from the circumstance that upon an occasion prior to the date of the note Wheeler went to the plaintiffs' banking-house for the purpose of opening an account for a new partnership into which he had entered, and there met an employé of the plaintiffs named Judson, who made certain inquiries of him, and that in response thereto he told Judson that he was the same Wheeler who had been a member of Wheeler & Co., that that firm had been dissolved, and that ⁴⁵⁶ he had formed another partnership for which the new account was desired to be opened. The finding was evidently intended to express the idea, and counsel have so treated it, that the plaintiffs had no knowledge of the dissolution, and dealt with Marsh, in the matter of the renewals thereafter, in good faith, in the belief that the firm still continued, and in reliance upon its assets and responsibility, unless the contrary should be inferred from the facts recited.

"Notice to an agent, to bind the principal, must be within the scope of the agent's employment, and notice to him of any fact outside the scope of his agency will not affect his principal": *Trentor v. Pothen*, 46 Minn. 298, 24 Am. St. Rep. 225, 233, note, 49 N. W. 129; *Farmers & Citizens' Bank*

v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Smith v. Board of Water Commrs., 38 Conn. 208; Farrel Foundry v. Dart, 26 Conn. 376; Willard v. Buckingham, 36 Conn. 395; Platt v. Birmingham Axle Co., 41 Conn. 255; McGurk v. Metropolitan Life Ins. Co., 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563; Ward v. Metropolitan Life Ins. Co., 66 Conn. 227, 50 Am. St. Rep. 80, 33 Atl. 902; Mechanics' Bank v. Schaumburg, 38 Mo. 228; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388.

It will be noticed that the statement made to Judson was incidentally made, and was not intended as a notice of dissolution. All that the finding discloses of this man, who thus casually acquired the information imparted by Wheeler, is that he was an employé of the plaintiffs. That he was not a janitor or errand boy is perhaps to be implied from the circumstances of the meeting and the character and apparent purpose of his inquiries. It would appear that his duties brought him into connection with depositors and their accounts. Perhaps he was a teller. However this may have been, there is absolutely nothing in the finding to indicate even presumptively that his employment related to the bank's discounts, or comprehended within its scope anything which had to do with the Wheeler & Co. notes or obligation, or which gave him any knowledge that there were such notes or obligation. Whether his principal's responsibility be determined upon the theory of the legal identity of the principal and agent, or as arising from the duty which the agent's ⁴⁵⁷ relation and the circumstances imposed upon him to communicate his information to his principal, the law under these circumstances does not impute Judson's knowledge of the dissolution of Wheeler & Co. to the plaintiffs. His information is not shown to have been of a fact within the scope of his agency.

The court of common pleas is advised to render judgment for the plaintiffs to recover the amount due upon the note in suit.

The costs in this court will be taxed in favor of the plaintiffs.

In this opinion the other judges concurred.

In Trading or Commercial Partnerships, each partner usually has implied authority to execute negotiable paper in the firm name. It is otherwise, however, in the case of nontrading partnerships: Schellenbeck v. Studebaker, 13 Ind. 437, 55 Am. St. Rep. 240; note to Baxter v. Rollins, 48 Am. St. Rep. 438-442. As to what is a trading and what

a nontrading partnership within this rule, see *Schellenbeck v. Studebaker*, 13 Ind. App. 437, 55 Am. St. Rep. 240; note to *Baxter v. Rolins*, 48 Am. St. Rep. 438-442. In *Snively v. Matheson*, 12 Wash. 88, 50 Am. St. Rep. 877, it is held that a partnership for the purpose of carrying on the business of general contractors and builders is not a general or trading partnership, nor is it made so by the fact that it furnishes a limited amount of goods to the men working for it and deducts the price thereof from their wages.

Notice to an Agent as notice to his principal is discussed in the monographic note to *Trentor v. Pothén*, 24 Am. St. Rep. 228-233. The general rule is, that notice to an agent, at least while acting within the scope of his authority, is notice to his principal: *Pennoyer v. William*, 26 Or. 1, 46 Am. St. Rep. 594, *Higman v. Camody*, 112 Ala. 257, 57 Am. St. Rep. 33. In *McClelland v. Saul*, 113 Iowa, 208, 86 Am. St. Rep. 370, it is held that knowledge acquired by an agent within a reasonable time before the agency exists is imputed to the principal.

FARRELL v. EASTERN MACHINERY COMPANY.

[77 Conn. 484, 59 Atl. 611.]

MASTER AND SERVANT—Defective Appliances—Negligence.—If a master keeps in his factory timbers for the construction of staging used in installing elevators, and his servant in charge of such installation selects from such timber supply a palpably defective plank, which causes the death of an unskilled workman, the master is liable for negligence in failing to provide proper materials for such staging, and the fact that the servant in charge of the installation had obtained from the owner of the building where the work was being done permission to use planks then therein, does not relieve the master from liability. (p. 49.)

MASTER AND SERVANT—Intervening Negligence of Employé.—The intervention of negligence on the part of an employé does not absolve the master from liability for the consequences of which the failure of the latter to exercise reasonable care was the efficient cause. (p. 49.)

S. C. Loomis and E. C. Simpson, for the appellant.

J. P. Goodhart and R. C. Stoddard, for the appellee.

⁴⁸⁸ PRENTICE, J. The defendant manufactures and installs elevators. Farrell, the plaintiff's intestate, who was an unskilled laborer, was its servant in the installation of a freight elevator in one of the shops of the National Wire Corporation. He worked with and under the direction and superintendence of one Maynard, another employé, who was skilled in the business, competent for the work intrusted to him, and a suitable fellow-servant. The prosecution of the work upon which they were engaged necessitated the

erection and use, upon each floor of the building, of stagings ⁴⁸⁹ conveniently placed over and across the elevator well. These stagings were required for the support of the men as they were engaged in putting the machinery in position, and to be suitable it was necessary that they be strong enough to bear not only their weight, but the strain resulting from such lifting of machinery parts as was involved in the work.

Farrell met his death through a fall down the well, which was occasioned by the giving way of the staging platform upon which he and Maynard were at the time standing in the act of lifting a piece of machinery into position. This platform, which was one plank wide, consisted of two thicknesses of plank, one placed upon another, and thus resting upon the supports. The breaking of these planks so placed in superposition was the consequence of their weak and defective condition, which rendered them unfit for staging use, one of them having a knot plainly visible extending nearly across its width and through its entire thickness at the place where it broke.

The trial court found, upon the facts shown, that the defendant, as master, failed in its duty to Farrell as its servant, and therein was negligent in a manner directly contributing to the latter's injury; in that (1) it did not use reasonable care to provide reasonably safe appliances and instrumentalities for his work, and (2) that it did not use reasonable care to provide a reasonably safe place for his work. Upon the facts the court also ruled and held that Maynard, in respect to the selection and use of the defective planks, as of all the material used in the staging and in its erection, was the defendant's representative and vice-principal, engaged in the performance of its duty as master.

The defendant contends: 1. That the court was mistaken in its conclusion last recited; 2. That the staging which fell was not, under the circumstances, a "place" within the meaning of the law which prescribes the master's duty; and 3. That it owed Farrell no duty quoad the staging, save those confessedly performed, other than to use reasonable care to provide reasonably suitable and safe material for its erection. As the logical consequence of the defendant's position ⁴⁹⁰ thus outlined, it claims that in the application of this rule of duty the material provided by it for the con-

struction of said staging is not to be regarded as that which was taken to the wire company's building by the direction of Maynard, but as that larger supply which the defendant kept on hand for staging construction in the room at its factory. The defendant's position upon these points of controversy may, for the purposes of this case, be assumed without decision.

We have, then, this situation: The defendant, as master, is to be charged with no dereliction in duty which arose subsequent to the time when Maynard ordered Farrell to go to the factory room where staging material was stored to obtain that which was to be used at the wire company's building. Maynard's acts from that time on are to be treated as those of a servant only—as the fellow-servant of Farrell. The defendant's responsibility thus becomes limited to such as may have been involved in the presence in that room of the material which was there and under the circumstances of its being there. This responsibility must, of course, be determined in view of the positive requirement of the master that he shall use reasonable care to provide reasonably safe appliances and instrumentalities for his servants in their work, and upon the theory which the defendant's position assumes, that the supply of material in this factory room is to be regarded as the "provision" in that regard within the meaning of the law.

This view of the situation, however, does not terminate the master's duty and fulfill its requirements prior to the intervention of an act of negligence, and of the very act in which the court has found the negligence to have consisted, to wit, the provision of the defective planks in question as instrumentalities designed and fit to be used for the work for which they were used. The plank with the plainly visible knot in it extending nearly across its width and through its entire thickness was in this room. So also was the other defective and unfit plank which gave way. It is to be borne in mind that this room in question was one in which the defendant ⁴⁹¹ kept planks and boards "provided and stored expressly for use in the construction of stagings or platforms when necessary in the installation of elevators." The room did not contain a miscellaneous supply or haphazard collection of lumber. The questions which would be presented by such a condition need have no consideration here. It was the storage place for material set apart, designed and

devoted by the defendant to the special use to which it was in fact put with the fatal consequences which furnish the occasion for this suit. This segregation of material was the defendant's act, and as our assumption involves the treatment of it as the defendant's provision, and his only provision, of the necessary reasonably suitable material, it follows that the same fault which Maynard later committed in selecting for use in a particular case the palpably defective plank which gave way—as it might have been expected to do—was earlier committed by the defendant when it selected and set apart the same plank with its palpable defect for use generally by its servants under circumstances like those in which it was used by Maynard and Farrell: *Twomey v. Swift*, 163 Mass. 273, 39 N. E. 1018. This, it will be observed, is not the case where the master has furnished a supply of appliances all free from defects known, or which ought by the exercise of due diligence to have been known, and sufficient for the work for which they are apparently adapted, and the servant has been careless in his selection therefrom for use. It is the very different case, where some of the appliances provided are palpably defective, and for that reason distinctly unfit in their quality to perform the work which might be reasonably expected of them. In the one case the sole negligence lies in the selection for immediate use. In the other there is negligence behind the selection for use, however negligent that selection itself may have been, to wit, negligence in the initial provision of the article as one suitable for the use. Neither is this a case where appliances have been put to a use or strain which was unusual or not to have been reasonably anticipated by the master. The situation which caused the break was the natural and normal one incident ⁴⁹² to the work for which the planks were designed, and to the use and strain which must have been foreseen when they were provided.

But it is said that Maynard, as a skilled and competent man provided by the defendant, ought in the exercise of reasonable care on his part to have detected the defective planks and discarded them, and that the accident was therefore attributable to his fault and not chargeable to the defendant. In so far as this contention involves the assertion of any benefit to the defendant from the fact of its having employed in Maynard a man competent to select suitable material and build a suitable staging, it runs counter

to the defendant's main contention that Maynard was in no respect its representative doing its duty as master. In so far as it asserts immunity from responsibility for the reason that reasonable care on the part of Maynard would have prevented any unfortunate consequence accruing to Farrell from its negligent act, it is without legal justification. The intervention of negligence on Maynard's part would not suffice to absolve the defendant from liability for consequences of which its failure to exercise reasonable care was an efficient cause: *Ashborn v. Waterbury*, 70 Conn. 551, 40 Atl. 458; *Carstesen v. Stratford*, 67 Conn. 428, 35 Atl. 276; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Louisville etc. Ry. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, 22 N. E. 14, 4 L. R. A. 721; *Ricker v. Freeman*, 50 N. H. 420, 432, 9 Am. Rep. 267; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266.

It is claimed that the defendant is saved from responsibility because the wire company had in its building, convenient to the place where the elevator was being installed, ample material suitable for the construction of the staging, and that permission to use this material was, prior to the beginning of the defendant's work of installation, obtained by the defendant through Maynard. If it be assumed that this lumber belonging to the wire company was by the course pursued provided by the defendant for its work and workers within the meaning of the law, the result is none other than that the defendant's supply of good material which might have been used was larger than it otherwise ⁴⁹⁸ would have been. The presence of the knotty and unfit plank among the material provided, due to the defendant's act, would still remain, and its responsibility, therefore, continue. This feature of the situation, therefore, adds nothing of significance to that which we have assumed to exist in the room at the defendant's factory. We have assumed that there was there a sufficient supply of that which was suitable for use which might have been taken and used by Maynard. Whether this supply was greater or less can be of no legal consequence.

A consideration of most of the reasons of appeal is either embraced within or obviated by the view of the case expressed.

One error assigned is the overruling of the defendant's claims of law stated in the finding as having been made upon the trial. These claims were eighteen in number and widely different in character. The assignment of error was therefore not specific, as required by statute, and need not be considered: Gen. Stats., sec. 802. The reasons for the rule are apparent and weighty, and it should be observed in both letter and spirit. The letter requires particularity and definiteness. The spirit forbids assignments which are frivolous, unnecessarily repetitious or multiplied, or not made in good faith. A proper compliance with the rule, therefore, permits an appellant to assign such errors of law as are in good faith claimed by him to have been committed and of which he has a reasonable expectation that he may wish to take advantage, and none other, and requires that these errors be assigned individually and not in gross. Our enforcement of the requirement of the statute in this case, however, deprives the defendant of the benefit of only one claim of error, and that is the minor and unfounded one that the complaint is not one which will support a judgment for more than the nominal damages incident to the default, by reason of its failure to aver in express terms, the fact found, that the intestate did not have equal means of knowledge with the defendant of the unsafe condition.

494 Two objections are made to the court's rulings upon the admission of evidence. The defendant could not have been harmed by either.

Exceptions to the finding were taken and are made the basis of reasons of appeal. These all relate to matters which our conclusions and the reasons therefor either render immaterial, or justify.

There is no error.

In this opinion the other judges concurred.

If an Employé is Injured by the failure of his employer to furnish him a safe place to work, the latter cannot escape liability on the ground that the injury was the result of the negligence of a fellow-servant in constructing an unsafe appliance, for the employer owes a positive obligation to his employé which cannot be avoided by deputing its performance to another servant: *Chicago etc. R. R. Co. v. Maroney*, 170 N. Y. 520, 62 Am. St. Rep. 396; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38. See, however, *Enright v. Oliver* 69 N. J. L. 357, 101 Am. St. Rep. 710; *Dougherty v. Milliken*, 163 N. Y. 527, 79 Am. St. Rep. 608.

SMITH v. DANA.

[77 Conn. 543, 60 Atl. 117.]

CORPORATIONS.—Cash Dividends upon corporate stock are to be regarded as income, and pass to the life tenant, while stock dividends are to be treated as capital and go to the remainderman. (p. 57.)

CORPORATIONS.—Capital Stock of a corporation is the fund, property, or other means contributed, or agreed to be contributed, by the shareholders as the financial basis for the prosecution of the business of the corporation, such contribution being made, either directly through stock subscriptions, or indirectly through the declaration of stock dividends. The term "capital" is used to designate that portion of the assets of a corporation, regardless of their source, which is utilized for the conduct of the corporate business and for the purpose of deriving therefrom gains and profits. (p. 59.)

CORPORATIONS.—Undistributed Profits or Surplus of a corporation in any form may be invested in the business of the corporation without thereby becoming "capital stock." Until such profits are effectually and irrevocably dedicated to corporate uses through the medium of a stock dividend, they do not pass beyond the control of the corporate directors, nor cease to be available for distribution as cash dividends to those originally entitled thereto as such. (p. 60.)

CORPORATIONS.—Undistributed Profits of a Corporation, though invested in permanent works, property, improvements, or acquisitions, or business extensions, do not become, by force of that fact permanent additions to the capital stock of the corporation, beyond the recall of the directors to be distributed as cash dividends. (p. 61.)

CORPORATIONS—Dividends.—It is presumed that when a solvent going corporation declares a lawful dividend, it is one to be paid out of profits. (p. 61.)

CORPORATIONS—Cash Dividends—Liquidation.—If undistributed profits of a corporation have been invested in its business for a time, and then converted into money and made payable to stockholders as cash dividends, such transaction, providing the corporation is solvent, is not a liquidation or surrender of a portion of its capital stock. (p. 63.)

C. E. Gross, G. Calkins and E. I. Baker, for the appellants.

C. W. Gross, for the appellee.

544 PRENTICE, J. The will of Alfred Smith who died in Hartford, the place of his residence, on August 12, 1868, was on August 16th following admitted to probate in the court of probate for the district of Hartford. By the will the testator gave to trustees the sum of \$100,000. By the terms of the trust the trustees were required to pay over the income to certain persons designated, during the lives of three grandchildren and the survivor of them, and upon the death

of the last survivor to divide and distribute the corpus in the manner provided. Each of the three grandchildren were made the beneficiary of a share of said income during his life. The defendant I. C. Bates Dana is the only one of them surviving. Certain of the other defendants are his children and the husband of one of them. The remaining defendants are the children of Alfred F. Dana, another of said grandchildren. The third died childless. It is assumed and conceded by all parties that these defendants embrace all who under the provisions of the will are or can become entitled to share in the income of the trust estate, and all who are or can become entitled to participate in the division of the corpus upon the termination of the trust to pay over income, unless it be persons representing them or hereafter born children of said Bates Dana. The children of Alfred occupy the position of both life tenants ⁵⁴⁵ and remaindermen. The claim which they here assert is made in the former capacity.

The will provided that in setting apart said trust fund of \$100,000, there should be included therein three hundred shares of the stock of the Holyoke Water Power Company which the testator owned, the same to be taken for that purpose at their par value. That was done. The capital stock of said corporation was then \$350,000. July, 1877, said capital was increased to \$600,000 by the issue of new stock subscribed and paid for at par. The right to subscribe for this new issue was accorded to existing stockholders pro rata. The trustees sold the rights attaching to said three hundred shares. In 1893 the capital stock was again increased to \$1,200,000, in the same manner as before. At this time the trustees subscribed for and took two hundred shares, making their trust holdings five hundred shares, and sold the remaining rights. December 20, 1902, the directors declared a cash dividend of sixty-five per cent, payable December 24th to stockholders of record December 20th. The plaintiff, who is the only survivor of the trustees, received the sum of \$32,500 as the amount of said dividend upon said five hundred shares. This sum he now holds. The defendants Bates Dana and the children of Alfred Dana claim the whole thereof, as income to which they are entitled. The children of Bates Dana claim that the whole, or at least the bulk of said sum, belongs to the corpus of the trust estate, and should be held by the trustee as an accretion thereto. The trial court sustained this claim with respect to approximately two-thirds

of the dividend, and adjudged that the balance be divided as income.

This conclusion and the reasons which the court gave in support of it, as well as those which counsel for said children of Bates Dana urge in support of their broader contention, require for their understanding and examination a statement of some of the facts which enter into the history of the corporation in question, and which serve to indicate the source and character of the corporate assets which formed the basis of the sixty-five per cent dividend.

⁵⁴⁶ Previous to 1859 the Hadley Falls Company, a Massachusetts corporation, had acquired a large tract of land where the city of Holyoke is now located, and had constructed a dam across the Connecticut river, extending from South Hadley on the northeasterly shore to Holyoke on the southwesterly shore, and had built locks and canals at Holyoke, and had laid out streets, sites for manufactories, tenements and residences, and several factories, residences, and other buildings had been erected. Among other buildings, said Hadley Falls Company had constructed a small gas plant which it operated. Subsequently said company went into a receiver's hands, and the Holyoke Water Power Company, hereinafter referred to as the Holyoke Company, was in 1859 organized with a capital stock of \$350,000 to purchase and take over said property of said Hadley Falls Company. The purchase was made, the entire capital of the Holyoke Company being paid as the consideration therefor. The purposes of the Holyoke Company, as defined in the act creating it, were of "upholding and maintaining the dam across the Connecticut river heretofore constructed by the Hadley Falls Company, and one or more locks and canals in connection with the said dam, and of creating and maintaining a water power to be used by said corporation for manufacturing and mechanical purposes, and to be sold or leased to other persons or corporations to be used for like purposes." The charter gave the corporation "full power and authority to purchase, take, hold, receive, sell, lease and dispose of all or any part of the estate, real, personal or mixed, with all the water power, watercourses, water privileges, dams, canals, rights, easements and appurtenances thereto pertaining or belonging, or therewith connected, or which have at any time heretofore belonged unto or been the property of the said Hadley Falls Company, and any other real estate that may be required for

the use of said corporation for the purposes contemplated by this act."

The Holyoke Company continued the manufacture, sale and distribution of gas by the usual means and methods, to supply the needs of the growing community which came⁵⁴⁷ into existence upon the site of its property, and which in time became the city of Holyoke, without other authority therefor than was contained in those portions of the charter recited, until 1873, when special legislative authority was obtained. In 1880 the company was—as required by law of all persons engaged in the generation and sale of electricity—duly authorized to engage in that business by an order of the board of gas commissioners. From that date down to December, 1902, it generated electricity for sale and distribution, erecting and maintaining a plant for that purpose.

As the result of proceedings instituted under the provisions of chapter 370 of the acts of the legislature of Massachusetts of the year 1891, which are in the main similar to those in force in this state regulating the establishment of gas and electric plants by municipalities within which there are existing public service plants of that character owned by private corporations, the city of Holyoke, on December 15, 1902, acquired both the gas and electric plants of the Holyoke Company, paying therefor the sum fixed by the commission appointed for that purpose by the court under the provisions of said act. Upon such acquisition, the right of the Holyoke Company to engage in the business of manufacturing and distributing gas or electricity ceased by virtue of the provisions of said act.

The amount so paid by said city to said company was \$721,043. By the use of said sum and other moneys of the corporation on hand—which at the time did not exceed \$150,000 in amount—the dividend in question, requiring the disbursement of \$780,000, was paid.

The actual cost to the company of the electric light plant was \$243,776.34.

Previous to the declaration of said dividend of sixty-five per cent, the market value of the shares of said company was from \$380 to \$385 per share. At the time of its declaration the company held real and personal property amounting in value to more than \$4,000,000 over and above all of its obligations. At the date of the commencement of⁵⁴⁸ this action the market value of the shares of the company, as evidenced

by the sale of a few shares of said stock, appeared to be from \$315 to \$325 per share.

All sums derived from the issue of stock have gone into the general treasury and there become mingled with the other funds of the company. No separation of funds has been made, and it is impossible to trace the funds derived from any one source so as to follow them into any distinct investments.

For many years the company has paid regular dividends of ten per cent per annum. Between February 1, 1899, and January 15, 1901, it paid extra dividends amounting to ninety per cent of the capital stock.

The present contention between those who stand in the relation of life tenants and remaindermen to trust funds invested in stocks, presents the oft-recurring question as to the rights of persons occupying those relations to participate in the benefits of a distribution to stockholders of the assets, or some portion of the assets, of the corporation. In the present case a solvent and going corporation, whose capital was undergoing no reduction in amount, declared a dividend payable and paid in cash. Life tenants of stock held in trust claim to be entitled to the dividend payment as income. Remaindermen claim that it should go to augment the capital account of the trust estate. In *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705, the necessity of some plain and simple rule which in situations like the present, frequently arising, should serve to guide trustees in the discharge of their duties and cestuis que trustent in the determination of their rights, without a resort to harassing and expensive litigation, was expressed, and such a rule formulated. This rule made the character of the dividend the test. Cash dividends it was said should be regarded as income, and stock dividends capital. It was not pretended that this rule, which has been commonly known as the Massachusetts rule, was the ideal rule of reason; nor have the courts of high authority which have given their approval of it ever claimed it to be such, or one which would accomplish exact justice under all ⁵⁴⁹ circumstances. What has been claimed for it is that its general application, at least if due regard be had for the substance and intent of the transaction, would prove more beneficent in its consequences, and on the whole lead to results more closely approximating to what was just and equitable, than would the application of any other rule or any attempt to go behind the declaration of

the dividend to search out and discover the equities of each case according to some theoretical ideal: *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. Rep. 1057, 34 L. ed. 525; *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025; *Lyman v. Pratt*, 183 Mass. 58, 61, 66 N. E. 423. The necessity for a rule which should serve as a guide and protection to trustees in the performance of their duties is apparent. The advantages of one which would make ceaseless litigation, with its attendant harassment and expense, unnecessary, are no less so. The uncertainty and difficulties attending any attempt at arriving at the true equities between parties respectively asserting income and capital interests, in the proceeds of a dividend declared, are not so readily appreciated. It requires, however, but slight reflection to discover the magnitude of the obstacles to be surmounted and the impossibility which must oftentimes be met, whereby the judicial search for precise equities necessarily becomes resolved into a speculation and a guess. There exists the ever-present difficulty of tracing financial results to their source, and of distinguishing between what of increased assets rightfully represents profits, and what represents increase of value appropriate to capital. Above all, there enters into most situations, to render courts powerless to arrive at any certain results, a controlling factor arising from the discretionary power which directors rightfully exercise to determine at all times, within reasonable limits, the destiny of profits and of accumulated profits represented by surplus: *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. Rep. 1057, 34 L. ed. 525. Profits may be distributed as earned. They may be in whole or part retained and utilized for the corporate advantage. They may be used for a time and later distributed. They may never be distributed, but permanently used in the ⁵⁵⁰ business. Whether they will inure to the benefit of stockholders in the way of a dividend may ever remain uncertain. Whether in the ordinary course they will fall to the lot of the life tenant as profits declared, or remain to enhance the value of the stock, will depend in part upon the action of the directorate and in part upon the term of the trust. They, as we shall have occasion to notice later on, can never acquire a status which must remain a fixed and abiding one, unless they are formally capitalized. Their future is ever an uncertain one, and none save one who can foretell the

action of boards of directors can discover it. The rights of stockholders are involved in this maze of doubt. Fixed rights there are not. Rights which are superior to those which may at any time be created by corporate management may not exist. In the presence of such conditions, courts must oftentimes find themselves powerless to ascertain and determine rights, since there may be nothing which lies without the domain of conjecture to act upon. The more the matter is studied the more apparent it becomes that the Maine court, speaking of the Massachusetts rule through Chief Justice Peters, was justified in its expression: "We are satisfied that this can be the only safe, sound, just and practicable rule, and that any attempt to engraft refined and nice distinctions upon such rule will be productive of much more evil than any good that can come from it": *Richardson v. Richardson*, 75 Me. 570, 574, 46 Am. Rep. 428.

This court has heretofore given its adhesion to the doctrine of *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705, as the one to be ordinarily applied: *Mills v. Britton*, 64 Conn. 4, 29 Atl. 231, 24 L. R. A. 536; *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618.

An application of this principle would, *prima facie* at least, quickly resolve the present contention in favor of the life tenants. The trial court, however, has regarded the rule, as it has been adopted in this jurisdiction at least, as a decidedly flexible one. The logical conclusion of the position taken in its exhaustive memorandum of decision, although not stated in precise terms, is that the rule is such a tentative one that it will yield where it appears upon inquiry ⁵³¹ that justice will not be accomplished by it. Starting with this premise the court arrived at the conclusion that in this case justice would not be done by its application, and the rule was therefore disregarded. An inquiry was then made into the sources of the funds out of which the dividend was paid, to discover what was conceived to be the true nature of the transaction and the real equities of the parties claimant. The court thus arrived at three vital conclusions which dictated the judgment as rendered, to wit: 1. That the accepted general rule must yield where it fails to accomplish just and equitable results; 2. That such results would not be reached in this case by its application; and 3. That the results established by the judgment were just and equitable ones.

Let us first consider the last two of these conclusions, since they furnish the key to the court's action. It is said that

the operation of the rule would be inequitable because it would, under the circumstances, result in the diversion to the life tenants, under the guise of income, of that which of right belongs to the stock as capital, and therefore the remainderman's. It is said that the distribution made by the court is equitable, because it prevents that diversion and gives the remaindermen what is equitably theirs, and that only. The same conception underlies both conclusions. They are, however, reached upon mistaken premises. These mistaken premises arise from a failure to properly distinguish between the different qualities which attach to the various assets of a private corporation, and between the different characters which these assets may assume.

A citation from the memorandum of decision will indicate the nature of the misconception which lies at the foundation of the trial court's argument and position, to wit: "All of the subject matter of these awards was properly appropriated to the uses of these plants, and hence permanently made a part of the capital of the company. . . . Corporate profits undistributed belong to the corporation. . . . When such profits are expended upon the property of the corporation used in its business, or devoted to the acquisition of ⁵⁵² new property, or to the creation of a new business, these constitute a permanent addition to capital beyond the recall of the directors. Once capital always capital. It makes no difference whether such augmentation of capital resulted from the proceeds of increase of stock or from profits appropriated to capital; it is the thing done with the funds which determines. Did it go to the increase or addition to the property of the corporation, and has it become permanently devoted as such to its uses? This is the test."

The misconception embodied in this statement was not a new one. It appears in the opinion in *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919, from which source the trial court apparently derived it. As that opinion was the utterance of the same court which promulgated the rule in *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705, and which has since repeatedly affirmed that rule, its expressions in argument were naturally accepted as authoritative without careful analysis. They will not, however, bear such analysis.

Capital is a term which, as applied to private corporations as ordinarily constituted, is used with widely varying significations. In one sense, the strict sense, it is employed to

designate specifically the fund, property or other means contributed, or agreed to be contributed, by the share owners as the financial basis for the prosecution of the business of the corporation, such contribution being made either directly through stock subscriptions, or indirectly through the declaration of stock dividends. As thus used the term signifies those resources whose dedication to the uses of the corporation is made the foundation for the issuance of certificates of capital stock, and which, as the result of the dedication, become irrevocably devoted to the satisfaction of all the obligations of the corporation: *State v. Norwich etc. R. Co.*, 30 Conn. 290; *Bailey v. Clark*, 21 Wall. 284, 22 L. ed. 651; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Iron Ry. Co. v. Lawrence Furnace Co.*, 49 Ohio St. 102; *Ried v. Eatonton Mfg. Co.*, 40 Ga. 98, 103, 2 Am. Rep. 563; *Commonwealth v. Charlottesville etc. Co.*, 90 Va. 790, 44 Am. St. Rep. 950, 20 S. E. 364; 1 Thompson on Corporations, sec. 1060. Sometimes the term "capital" is used when what is ⁵⁵³ meant to be designated is that portion of the assets of a corporation, regardless of their source, which is utilized for the conduct of the corporate business and for the purpose of deriving therefrom gains and profits: *Iowa State Sav. Bank v. Burlington*, 98 Iowa, 737, 739, 61 N. W. 851; *People v. Feitner*, 56 App. Div. 280, 67 N. Y. Supp. 893; *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919. Frequently the term is employed in a still wider sense, as descriptive of all the assets, gross or net, of a corporation, whatever their source, investment or employment: *Security Co. v. Hartford*, 61 Conn. 89, 23 Atl. 699; *Batterson's Appeal*, 72 Conn. 374, 44 Atl. 546; *People v. Coleman*, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762; *Ohio etc. R. Co. v. Weber*, 96 Ill. 443; *State v. Lewis*, 118 Wis. 432, 95 N. W. 388.

In *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919, the court drew a distinction between those undistributed profits which have been applied to and invested in the increase and improvement of the property used in the business of the corporation, and those profits which may have been set aside for use in the conduct of the business but not invested in permanent works. The former, it said, was capital; the latter, "floating capital." The former, it said, was as effectually capitalized as they would have been through the declaration of a stock dividend. The trial court accepted this principle as a sound one, and thereon based its argument and conclusions, as witness its language already recited, to wit: "When

such profits are expended upon the property of the corporation used in its business, or devoted to the acquisition of new property, or to the creation of a new business, these constitute a permanent addition to capital beyond the recall of the directors. Once capital always capital."

This proposition contains a fundamental error. The quality and incidents of surplus, however invested or employed, are not the same as those of capital within the strict meaning of that word. Capital, in that sense, constitutes a fund so set apart and devoted to the corporate uses and the security of creditors that the law jealously guards it from the encroachment of directors in the declaration of dividends. It is placed beyond their reach for that purpose, and ⁵⁵⁴ no way is left open to them to return it to the share owners. Its dedication is irrevocable, and it must ever remain a fund held in trust for creditors, unless some judicial or other process authorized by legislation intervenes. Of it, it may well be said, "once capital always capital." It is not so of undistributed profits or surplus in any form. They may be effectually dedicated to corporate uses through the processes of a stock dividend, but until so dedicated they are not removed from the reach and control of directors. The manner of utilization may be changed, investments altered, permanent property sold and turned into cash, and experimental or other enterprises abandoned with a realization upon the investments therein, all at the discretion of directors, with no such artificial consequence that the assets thus employed change their character as the result of the process. Investment in permanent works does not and ought not to capitalize. Directors can in their discretion, fairly exercised, withhold profits and employ them in the conduct or enlargement of the business. By the same right they ought to be able to, and can, withdraw from any action which will enable the assets thus employed to be returned to their original condition as funds available for distribution to those to whom they might have been originally divided as dividends. Capital of this kind does not bear the perpetual stamp of capital. It simply constitutes a portion of the corporate assets which are within the discretionary control of the directors, which they may use for the corporate advantage in such ways as have the approval of their judgment, or, if that course seems wiser, cease using and by proper action withdraw from the corporate resources.

It follows that the court's second and third conclusions—in so far as they rest upon the mistaken proposition that undistributed profits when once invested in permanent works, property, improvements, or acquisitions or business extensions, become by force of that fact permanent additions to capital beyond the recall of directors and possessing the quality of capital in the strict sense—are unjustified. There is nothing growing out of the corporate relation or any of ⁵⁵⁵ the incidents of corporate estate, which can support the argument which is made to rebut the presumption that when a solvent, going concern declares a lawful dividend, it is one to be paid out of profits, since capital cannot be impaired: 2 Thompson on Corporations, sec. 2192.

We have thus far pursued the line of argument of the trial court. There is another aspect of the question which possibly requires attention. While invested assets do not become capital in such sense that they thereafter have the quality and incidents of strict capital, it might be suggested that the character of such assets, by their investment in permanent works, improvements, or extensions, becomes such that, as between owners of successive stock interests, they ought in justice to be regarded as capital, in the general sense that they should thereafter belong to the capital rather than the income side of those interests: 1 Cook on Corporations, sec. 8.

The reason for this is not apparent. Their source is, presumptively, and for the most part in fact, profits: 2 Thompson on Corporations, sec. 2192, and his article on "Corporations," 10 Cyc. 562. In so far as such is the case, their status as invested surplus has been created by the lawful fiat of directors, through the withholding and appropriation for use of what might have gone out as income: *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. Rep. 1057, 34 L. ed. 525; *Bouch v. Sproule*, L. R. 12 App. Cas. 385; *Pratt v. Pratt, Read & Co.*, 33 Conn. 446. It would seem fair that its return by the same means to its original status should be as possible as its first transition, and as fair that, when it has been transformed back into cash and a cash dividend declared and paid therefrom, the benefit of that dividend should be dependent upon the final act of the directorate thereon as upon some arbitrarily chosen intermediate act. Our adopted rule rests upon that proposition. It sees no injustice in its general application, and therefore admits of no relaxation when other conditions are not shown.

There remains to be considered still another aspect of the case. The court finds justification for its conclusions, and counsel for the remainder interests attempt to support the ⁵⁵⁶ judgment, upon a line of reasoning which differs in form at least from those already considered, although it may appear that in its ultimate analysis it rests upon the same fundamental erroneous conception. We have therefore to return to a consideration of the first of the court's conclusions as we have classified them.

The memorandum of decision discloses that the trial court accorded to the rule as adopted in this jurisdiction too much elasticity. We have already had occasion to discuss its importance and beneficent character when reasonably interpreted and applied. If our observations were well made and the commendations of eminent authorities justified, the conclusion would follow that it was not only a safe and sane one upon occasions, but also a rule which, if used with a proper regard for the substance and intent of the vote of declaration, would be a judicious one for general application and to which few, if any, exceptions should be admitted. In that spirit and to that effect it has been accepted by this and other courts. We have no occasion to make the academic inquiry as to whether, the rule being interpreted as suggested, any or what circumstances would justify a suspension of its operation. Certain it is that it ought not to be, and is not, one which yields whenever an investigation might appear to indicate its failure in a given case to accomplish what might be conceived to be exact justice upon the basis of some theoretical view of the ultimate rights of persons asserting conflicting successive stock interests. One of the purposes of the rule is to put an end to all such investigations, under all ordinary conditions at least. The prohibition of inquiry naturally and properly extends to all that field of investigation which we have thus far had under consideration in this case.

There remains, however, another aspect of the situation before us, which is relied upon as satisfying the conditions of what is termed an approved exception. As nothing else is pointed out as justifying a departure from the literal enforcement of the rule, we may well confine our discussion to the claim which is made. In *Second Universalist Church* ⁵⁵⁷ v. *Colegrove*, 74 Conn. 79, 83, 49 Atl. 902, we held that where the assets of a corporation were distributed to the share owners in liquidation, they were, as between life tenants and

remaindermen, to be treated as principal or capital and not income, although the distribution was made in the form of a cash dividend. See, also, to the same effect, *Gifford v. Thompson*, 115 Mass. 478. It is needless to inquire whether or not the principle involved in these cases constitutes a true exception to the general rule as properly interpreted. Whether it does or not, it is plain that it is a just and sound one. On the behalf of the remaindermen it is contended that this principle is as applicable to partial as to complete liquidations. By partial liquidations we understand to be meant proceedings involving the surrender by the corporation of portions of its capital, using that term in its strict sense. The contention may for the purposes of this case be conceded. But there has been no liquidation, complete or partial, of the Holyoke Company, nor anything tantamount thereto. The company has withdrawn from certain incidental branches or departments of its business as it was formerly, in the discretion of its directors, conducted, and converted what had been the investment of some of its assets in those departments into cash. The amount of the company's capital stock after the dividend remained unchanged. It was not only unimpaired, but continued to represent an ownership of net assets amounting to nearly three times the par value of its stock. The shares continued to be worth \$300 or more each. The business of the corporation remained the same in its general character and purposes, and the inception of these proceedings found it a prosperous going concern—the same in all essentials it was before the city of Holyoke's threatened competition made a change in the scope of its operations an apparently wise act of corporate management. Clearly there was nothing in the nature of liquidation or a return of capital in the transaction under consideration.

The remaindermen claim that they will be aggrieved if the life tenants are permitted to take this dividend. That must depend upon the view which is taken of their rights⁵⁵⁸ and equities. The advocates of judicial investigation for the purpose of ascertaining and establishing, in each case, the rights of the parties, have most commonly and confidently asserted that the rule which alone could lead to exact justice was one which recognized the right of remaindermen to have the capital, and those profits which had accumulated prior to the inception of the trust, retained in the corpus, and that of life tenants to receive subsequent accumulations: *Earp's Appeal*,

28 Pa. St. 368; Smith's Estate, 140 Pa. St. 344, 23 Am. St. Rep. 237; 2 Thompson on Corporations, sec. 2196; 2 Cook on Corporations, sec. 552. Even if this rule, which of all rules professes to be most mindful of strict equities, were accepted for application to the present situation, we should look in vain through this record to discover any suggestion that a disposition of this dividend as income would operate to the injury of those asserting the remainder interest in the corpus, which, after the dividend, remained worth three times what it was worth when the trust took effect.

It is conceded that the decision of the case is to be governed by the law of Connecticut. Massachusetts law would lead to the same result.

There is error; the judgment is reversed and the cause remanded for the rendition of judgment in accordance with the views herein expressed.

In this opinion the other judges concurred.

The Right of Life Tenants to Stock Dividends is discussed in the note to Allen v. De Groodt, 14 Am. St. Rep. 633-635; and in the subsequent cases of Davis v. Jackson, 152 Mass. 58, 23 Am. St. Rep. 801; Estate of Smith, 140 Pa. St. 344, 23 Am. St. Rep. 237. In the note to Gibbons v. Mahon, 54 Am. Rep. 265, it is stated that the better doctrine is, that dividends derived from the earnings of a company, no matter when such earnings were realized, belong to the life tenant if they were declared during the existence of his estate, even though they are stock dividends. On the apportionment of dividends between the life tenant and the remainderman, see Hite v. Hite, 93 Ky. 257, 40 Am. St. Rep. 189; Thomas v. Gregg, 78 Md. 545, 44 Am. St. Rep. 310.

BRYAN v. BIGELOW.

[77 Conn. 604, 60 Atl. 266.] .

WILLS—Incorporation of Extrinsic Document—Declaration of Trust.—If there is no such clear, explicit reference in the will itself to any specific document as to incorporate a sealed letter found with the will into the will itself, such defective reference cannot be helped by parol evidence, nor can such letter act as a valid declaration of a trust mentioned in the will without disclosing either the name of the beneficiary or the terms of such trust. (p. 67.)

WILLS.—Extrinsic Evidence may be Admitted to Identify the devisee or legatee named, or the property described in the will, or to make clear the doubtful meaning of language used in the will, but is never admissible, however clearly it may indicate the testator's in-

tention, to show an intention not expressed in the will itself, nor for the purpose of proving a devise or bequest not contained in the will. (pp. 67, 68.)

WILLS.—An Attempted Testamentary Disposition of Property by an instrument not executed as a will and which cannot be made part of it, and without disclosing in the will either the purpose of the bequest to a so-called trustee, or the name of the person who is to receive the benefit of the gift, is void and must fail. (p. 69.)

WILLS—Evidence.—Resulting trusts created by will which can be rebutted by extrinsic evidence are those claimed upon a mere implication of law, and not those arising on the failure of an express trust for imperfection or illegality. (p. 69.)

For the letter relied on, see Bryan's Appeal, ante, p. 34.

H. G. Newton, W. J. Bryan and H. Hewitt, for the appellant.

H. Stoddard, for the appellees.

⁶¹¹ **HALL, J.** This is an action brought by William J. Bryan, as executor of the will of Philo S. Bennett, to determine the construction to be placed upon a certain clause of Mr. Bennett's will, upon the ground that there is such a question as to its proper construction that the executor cannot safely discharge the duties of his office without the advice and protection of a court of chancery.

The questions presented by this appeal are stated in the following inquiry propounded by the executor in paragraph 9 of the complaint: "Are the bequests and trusts mentioned in section 12 of said will valid, and is said Grace Imogene Bennett, in said section named, or are the residuary legatees, entitled to receive the fifty thousand dollars (\$50,000) therein mentioned, or is William J. Bryan entitled to receive the said sum?"

The real question to be considered is whether the trust upon which the fifty thousand dollars was given to Mrs. Bennett has been lawfully created; if it has not, the money should not be paid to her, either as an individual or as a trustee. Mrs. ⁶¹² Bennett herself makes no claim, either as an individual or as a trustee, to any interest in the money, as a legatee under the twelfth clause of the will. If the trust upon which the sum is given to her by paragraph 12 is neither disclosed by the will itself, nor created by the sealed letter, the gift to her as trustee becomes inoperative, and the beneficial interest in the sum named results to the residuary legatees named in section 34 of the will: 1 Perry on Trusts, 5th ed., secs. 92,

150, 157; Lewin on Trusts, Amer. ed. 1888, with notes, 144; Phelps v. Robbins, 40 Conn. 250, 274. The controversy is therefore one between Mr. Bryan as an individual and as an alleged trustee under the sealed letter, Exhibit 1, upon the one hand, and the residuary legatees, of whom Mrs. Bennett is one, upon the other; the issue between them being whether a valid bequest of the fifty thousand dollars named in the sealed letter and in section 12 of the will, has been made to Mrs. Bennett in trust, either by force of the sealed letter itself, or by the twelfth paragraph of the will, or by the sealed letter and said paragraph together.

The sealed letter is an instrument of both a dispositive and testamentary character. It directs to whom the money shall be paid by Mrs. Bennett, and it directs that it shall be paid after the death of the testator, without giving any interest in the sum named to take effect during his life.

No effect can be given to this letter as a part of the will, even if the evidence offered proves that it was in existence and known to the testator at the time the will was executed. We held in Bryan's Appeal, 77 Conn. 240, 246, ante, p. 34, 58 Atl. 748, that there was no such clear, explicit reference in the will itself to any specific document, as to incorporate the sealed letter into the will, and that such defective reference in the will could not be helped out by parol evidence.

The letter cannot operate as a declaration of the trust upon which the money was bequeathed to Mrs. Bennett. Our statute of wills is not only directory but prohibitory: Irwin's Appeal, 33 Conn. 128. To treat this letter as an operative declaration of trust would be, in effect, to hold that a testamentary disposition of property could be made ⁶¹³ by an instrument not executed in conformity with the statute regulating such transfers of property. Mr. Perry in his treatise on the Law of Trust and Trustees, fifth edition, volume 1, section 92, in discussing the question of whether a parol expression of intention by a testator to create a trust, though void as a devise or bequest, may yet be good as a declaration of trust, and quoting with approval the language of Lewin on Trusts, says: "We may therefore safely assume, as an established rule, that if the intended disposition be of a testamentary character and not to take effect in the testator's lifetime, but ambulatory until his death, such disposition is inoperative, unless it be declared in writing in strict conformity with the statutory enactments regulating devises and

bequests." Again, in *Phelps v. Robbins*, 40 Conn. 250, 273, in referring to the claim made, that documents which were held to be so defectively referred to in a will as not to become a part of it might still be used as a declaration of the trust upon which the property was conveyed to the trustees named in the will, this court said: "Allowing them thus to operate is in effect making them a part of the will." In speaking of the effect of the statute of wills, Judge Loomis, in giving the opinion of the court in *Lane's Appeal*, 57 Conn. 182, 187, 14 Pa. St. 94, 17 Atl. 926, 4 L. R. A. 45, says: "So that our statute amounts to a positive rule for the transmission of property, which must be complied with, as a complete act at the time of the execution, or never, so far as the act of the testator is concerned." To the same effect is *Goodwin v. Keney*, 49 Conn. 563, 565.

That the twelfth clause of the will, unaided by the sealed letter, makes no disposal of the equitable interest in the fifty thousand dollars named therein, admits of no question. To what purposes the sum given to Mrs. Bennett in trust is to be devoted, and in whom the beneficial interest in that sum is to vest, is neither stated nor attempted to be stated in paragraph 12, independently of Exhibit 1.

But it is urged that the twelfth clause of the will and the sealed letter, read together, clearly show the purposes to which the testator intended the fifty thousand dollars given to Mrs. Bennett ⁶¹⁴ in trust should be devoted by her, and show a valid bequest to her as trustee; and that the sealed letter and other exhibits offered in evidence should have been received for the purpose of showing such intention of the testator, and of thus enabling the court to properly construe the will.

It may be conceded that such an intention of Mr. Bennett is clearly shown by these exhibits, but it does not follow that they are for that reason admissible as evidence, or that they can be considered in construing the will. While extrinsic evidence may be admitted to identify the devisee or legatee named, or the property described in a will, also to make clear the doubtful meaning of language used in a will, it is never admissible, however clearly it may indicate the testator's intention, for the purpose of showing an intention not expressed in the will itself, nor for the purpose of proving a devise or bequest not contained in the will. It is "a settled principle that the construction of a will must be derived from the words of it, and not from extrinsic averment": *Greene v. Dennis*,

6 Conn. 292, 299, 16 Am. Dec. 58. A will cannot be established by showing an intent to make one: *Avery v. Chappel*, 6 Conn. 270, 275, 16 Am. Dec. 53. In *Crosby v. Mason*, 32 Conn. 482, 487, a superscription upon a package of papers, reading "For Amasa Mason—accounts, notes, drafts, and vouchers to make up to him the sum of \$90,000 devised to him by will," and which, in the clause of the will containing a bequest to said Amasa, was referred to by the words "which will be found sealed up and among my papers, and directed to him," was held to be admissible for the purpose of identification only, and that the words "devised to him by will" could not be used as evidence that the contents of the paper were bequeathed. The court said: "If there is not a complete bequest without adopting the superscription it will fail." In *Fairfield v. Lawson*, 50 Conn. 501, 508, 47 Am. Rep. 669, the court, by Judge Loomis, said: "The law is imperative that the entire will must be in writing, and herein are found the rules and limitations that must be applied to such evidence. The intent must in every case be drawn from the will, but never the will from the intent." "So far as concerns the ⁶¹⁵ construction of a will, the question always is, not what the testator meant to say, but what is mean by what he did say": *Weed v. Scofield*, 73 Conn. 670, 677, 49 Atl. 22. In aid of the process of construction and interpretation, extrinsic evidence may be received "for the purpose of rightly understanding the meaning of the words of his [the testator's] will": *Thompson v. Betts*, 74 Conn. 576, 580, 93 Am. St. Rep. 235, 51 Atl. 564.

The sealed letter and other exhibits were not admissible in the case at bar for the purpose of identifying the beneficiary of the trust described in paragraph 12, for not only is there no beneficiary or trust described in that section, but it clearly appears from the language of the will that it was the intention of the testator that neither the name of the beneficiary nor the purpose of the trust upon which the bequest was made to Mrs. Bennett should be disclosed by the will, but that they should be stated in another instrument.

The evidence offered was not admissible upon the ground of a latent ambiguity in the language of the will. There is no latent ambiguity in the language of paragraph 12. What the testator has said in this clause of the will is clearly stated; and what he intended to say in this paragraph, concerning the gift of the beneficial interest in the fifty thousand dollars

and the name of the beneficiary, he has evidently fully stated. We are unable to determine from the language of the will what use it was intended Mrs. Bennett should make of the sum bequeathed to her as trustee, not because the meaning of the language of paragraph 12 is doubtful or obscure, but because the language used does not state or assume to state the use which it was intended Mrs. Bennett should make of the sum so given to her in trust. In the words of the sealed letter—"It is my desire that the fifty thousand dollars conveyed to you in trust by this provision [paragraph 12 of the will] shall be by you paid to William Jennings Bryan of Lincoln, Nebraska, or to his heirs if I survive him"—and not in the will, we discover the real gift which the testator intended to make. The sealed letter and Exhibits 2, 3, 4 and 5 were inadmissible for the purposes of ⁶¹⁶ construction and interpretation, because the intended bequest described in them is not contained in the will. The gift itself fails, because it is an attempted testamentary disposition of property by an instrument not executed as a will, and which we have held not to be a part of it, without disclosing in the duly executed will either the purpose of the bequest to the so-called trustee, or the name of the person who was to receive the benefit of the gift.

The excluded evidence was not admissible to rebut a resulting trust to the residuary legatees. "The resulting trusts which can be rebutted by extrinsic evidence are those claimed upon a mere implication of law, not those arising on the failure of an express trust for imperfection or illegality": *Woodruff v. Marsh*, 63 Conn. 125, 141, 38 Am. St. Rep. 346, 26 Atl. 846.

The cases of *Dowd v. Tucker*, 41 Conn. 197, *Buckingham v. Clark*, 61 Conn. 204, 23 Atl. 1085, and other cases in which trusts *ex maleficio* have been declared against persons who have obtained property by promising to apply it to certain purposes, have been cited as applicable to this proceeding. Assuming that while the fifty thousand dollars was still in the hands of the executor the superior court, as a court of equity, might, in this proceeding, in directing to whom the money should be paid, have considered whether if paid to Mrs. Bennett, or the residuary legatees, they or either of them could be held to be trustees *ex maleficio* by reason of an express or implied promise to apply the money to the purposes named in the sealed letter, we cannot find error in the judg-

ment of the superior court, since neither the evidence excluded nor the facts proved show any agreement, express or implied, by Mrs. Bennett or the other residuary legatees, to accept the money upon the trust described in Exhibit 1, or that during the lifetime of the testator they even knew of any of the provisions of the twelfth clause of the will. Proof that Mrs. Bennett possessed such knowledge was not prevented by the rulings of the court sustaining the demurrer to Mr. Bryan's answer and denying his motion for leave to file a cross-complaint. These rulings were not upon the ground that evidence of that fact was inadmissible, and an opportunity ⁶¹⁷ was apparently given to the claimant Mr. Bryan, during the trial of the case, to offer the evidence of Mrs. Bennett, without objection, as to the facts upon which a disclosure was asked for. Further discussion of these rulings is unnecessary, since they did not prevent the claimant Mr. Bryan from proving upon the trial all the facts alleged in his answer and cross-complaint.

There is no error.

In this opinion the other judges concurred.

INCORPORATION OF EXTRINSIC PAPERS INTO WILLS.

- I. Formality of Document, 70.**
- II. Reference in Will, 71.**
- III. Identification of Paper, 72.**
- IV. Existence of Document, 73.**
- V. Document Creating or Defining Trust, 74.**

I. Formality of Document.

The general rule is that an extrinsic document, sought to be incorporated into a will by reference, need not be formally executed in any respect in order to admit of such incorporation. It need not be even signed or attested, according to the weight of authority. "The law is, that if a testator in his will refers expressly to another paper, and the will is duly executed and attested, that paper, whether attested or not, makes part of the will, but the instrument referred to must be so described as to manifest distinctly what the paper is that is meant to be incorporated, and in such a way that the court can be under no mistake, and the reference must be to a paper already written, and not to one to be written subsequently to the date of the will": *Chambers v. McDaniel*, 6 Ired. 226. A paper referred to in a will, or described so that there can be no doubt as to its identity, becomes part of the will, whether executed or not, but a paper executed after the will, and not attested, can have no operation as a testamentary paper: *Johnson v. Clarkson*, 3 Rich. Eq. 305.

An extraneous unsigned writing may, by force of a clearly expressed intention in the body of the will constitute a part of the will itself, but the reference in the will must be complete and unambiguous and cannot be aided by extrinsic proof: *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478. If a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt of its identity, such paper may be incorporated into the will and become a part thereof, although such paper is not subscribed or even attached: *Tonnelli v. Hall*, 4 N. Y. 140. A testator may refer expressly to a paper already executed, though not attested, and describe it with such particularity as to incorporate it virtually into the will: *Thayer v. Wellington*, 9 Allen, 283, 85 Am. Dec. 753. "The effect of a reference, in a duly executed will, to an extraneous paper, in incorporating that paper into the will, so as to make it, ipso facto, a portion of the will itself, is a highly important point to be borne in mind in determining all questions connected with the mode of procedure, in the probate of the will under such circumstances. The cases already referred to show very clearly that a will required to be witnessed by two or more persons, or executed with any other prescribed formalities, may, nevertheless, adopt an existing paper by reference. Of course, the reference must be certain and to an instrument then in existence": *Estate of Willey*, 128 Cal. 1, 60 Pac. 471.

A paper referred to in the will, and containing directions for the disposition of property, but not executed or attested as a will, should be admitted to probate as part of the will, if it is in existence at the date thereof and is clearly identified: *Newton v. Seaman's Friend Soc.*, 130 Mass. 91, 39 Am. Rep. 433. Under the present statute of wills in operation in New York, a different rule prevails. It is there held that an existing document clearly referred to in, and identified by, the will cannot be incorporated therein and become a part thereof, unless duly executed and attested in the same form as is required in the case of a will: *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E. 238; *In re Andrews' Will*, 162 N. Y. 7, 76 Am. St. Rep. 294, 56 N. E. 529, 48 L. R. A. 662; *Thompson v. Quimby*, 2 Brad. Surr. 449.

II. Reference in Will.

The authorities are thoroughly agreed that if a will is duly executed and attested and the testator therein expressly refers to an extrinsic paper then existing, such paper may be incorporated into, and become part of the will, provided the instrument is so described as to manifest distinctly what is the paper that is meant to be incorporated: *Estate of Young*, 123 Cal. 337, 55 Pac. 1011; *Phelps v. Robbins*, 40 Conn. 250; *Hall v. Hill*, 6 La. Ann. 745; *Fickle v. Snapp*, 97 Ind. 289, 49 Am. Rep. 449; *Tonnele v. Hall*, 4 N. Y. 140; *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478; *Chambers v. McDaniel*,

6 Ired. 226; Johnston v. Clarkson, 3 Rich. Eq. 305; Pollock v. Glassell, 2 Gratt. 439; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. 188. An existing writing may by reference be incorporated into, and made a part of a will, but, before such extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt: Estate of Young, 123 Cal. 337, 55 Pac. 1011; Phelps v. Robbins, 40 Conn. 250; Tonnele v. Hall, 4 N. Y. 140.

Under this rule notes made by the testator, payable at his death, folded up with his will, referred to and clearly identified therein, and remaining in his possession at his death, become a part of his will: Fickle v. Snepp, 97 Ind. 289, 49 Am. Rep. 449. A written instrument denominated a will, and the schedules attached to and mentioned in it, will be considered as one instrument and as together constituting the will: Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. 188. Books of account, expressly referred to in a will may be incorporated therein and become part thereof: Bullock v. Bullock, 2 Dev. Eq. 307. A schedule or other extrinsic writing, not referred to nor in any way identified in the will, forms no part thereof and cannot be incorporated therein: Fickle v. Snepp, 97 Ind. 289, 49 Am. Rep. 449. Thus a schedule of advancements made by a testator to some of his children, but not mentioned nor referred to in his will, and made at a different time, does not form part of the will: Grabill v. Barr, 5 Pa. St. 441, 47 Am. Dec. 418.

III. Identification of Paper.

In order that an extrinsic document may be incorporated into a will and become a part thereof, it must not only be expressly referred to therein, but it must also be clearly identified as being the specific paper mentioned in the will: Hall v. Hill, 6 La. Ann. 745. "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such": Newton v. Seaman's Friend Soc., 130 Mass. 91, 39 Am. Rep. 433. The identification of the paper must be had from the description thereof as given in the will itself: Estate of Young, 123 Cal. 337, 55 Pac. 1011. The reference in the will to the writing must be complete and unambiguous, and cannot be aided by extrinsic evidence, but the identification of the writing referred to may be the subject of extrinsic parol testimony: Webb v. Day, 2 Dem. Surr. 459; Baker's Appeal, 107 Pa. St. 381, 52 Am. Rep. 478. In the case of *In re Sanderson's Will*, 9 Misc. Rep. 574, 30 N. Y. Supp. 848, it appeared that the

decedent left two papers, each in a sealed envelope with an indorsement that it was the testatrix's will. The first paper made certain disposition of the testatrix's property for the life of named persons, and the remainder to "persons named on another sheet and inclosed in another envelope which shall not be opened until after the death of" such persons. Both papers bore date the same day and were executed in due form, but the second paper did not refer to first, and it was held that the second paper was not sufficiently identified as that referred to in the first, and therefore could not be taken as part of the will. This ruling must follow where an extraneous paper produced as and for a paper referred to in the will, and shown to have been in existence at the time of the execution of the latter may be adjudged to form, and be admitted to probate as part of the will, where, and only where, by satisfactory and conclusive evidence, it has been proved to be the very same paper which the testator, by his words of reference, designed to indicate: *Dyer v. Ewing*, 2 Dem. Surr. 160. A paper may be referred to, and made part of, a will if such paper is in existence at the time the will is executed, and is so referred to in the will that it is capable of being identified from inspection or by the aid of parol or other evidence: *In re Shillaber*, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. 453.

IV. Existence of Document.

Perhaps the most important and essential requisite to the incorporation of an extrinsic document into a will by reference is that it must be in existence at the time the will is executed, otherwise it can form no part of the will. The rule we believe to be universal that words of reference in a will to an extraneous paper are not effectual to incorporate it therein when not physically annexed to the will, unless it can be clearly shown that such paper was in existence at the time of the execution of the will: *In re Shillaber*, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. 453; *Phelps v. Robbins*, 40 Conn. 250; *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185; *Newton v. Seaman's Friend Soc.*, 130 Mass. 91, 39 Am. Rep. 433; *Tonnele v. Hall*, 4 N. Y. 140; *Dyer v. Ewing*, 2 Dem. Surr. 160; *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478; *Chambers v. McDaniel*, 6 Ired. 226. It naturally follows that a paper referred to in the will, but not executed nor in existence when the will is made, cannot form part thereof, nor be admitted to probate as such: *In re Shillaber*, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. 453; *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185. Hence, if a will bequeath property to an executor to be disposed of as directed in a letter to him from the testator of the same date, and such letter is written and signed after the will is executed, though on the same day, it cannot be admitted to probate as a part thereof: *In re Shillaber*, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. 453. A paper referred to in the will

but not written until after the execution of the latter, and not attested, can form no part of the will, nor constitute a testamentary document: *Johnston v. Clarkson*, 3 Rich. Eq. 305. Of course a letter written after the execution of the will, unattested and unincorporated into the will by reference, cannot operate as a codicil to or as part of the will: *Magoohan's Appeal*, 117 Pa. St. 238, 2 Am. St. Rep. 660, 14 Atl. 816. If a will devises property in trust, and recites that the trust is set forth in a written instrument prepared by the testatrix, although such instrument is dated the day previous to the date of the will, if its concluding paragraph indicates that it was not executed until two months after the date of the will, it cannot be considered as part thereof: *Vestry of St. John's Parish v. Bostwick*, 8 D. C. App. 452.

V. Document Creating or Defining Trust.

That an extrinsic document creating or defining a trust may be incorporated into and become part of a will, it must be in existence at the time the will is executed, must be clearly referred to therein, and must be identified as the instrument referred to in the will. If all these essentials exist, the extraneous document is generally deemed to be part of the will. Thus, if a specific and certain reference is made in a will to a trust deed then executed to a person named in the will by the testator, to whom he devises all of his property in trust for the uses and purposes set forth and declared in such trust deed, it is not necessary that the deed should be presented to the probate court and formally and expressly certified as probated in order for it to become part of the will: *Estate of Willey*, 128 Cal. 1, 60 Pac. 471. If, however, a conveyance in trust of certain property has been drawn up and not duly executed, a recital in the will that the conveyance has been made does not cause the unexecuted instrument to become operative as part of the will: *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185. Or if a will devises property in trust, and recites that such trust is set forth in a written instrument prepared by the testatrix, but it appears that such instrument was not executed until two months after the date of the execution of the will, such written instrument cannot be considered as becoming a part of the will: *Vestry of St. John's Parish v. Bostwick*, 8 D. C. App. 452. In *Phelps v. Robbins*, 40 Conn. 250, it appeared that the testator devised certain real estate by the following clause, "I give the same to my executors in trust, to be disposed of by them in such manner as I shall direct by written instructions in my handwriting to be left with my will," and it was held that a paper found with the will, drawn and signed by the testator, giving specific instructions as to the disposition which he wished to have made of the real estate in question, was not to be regarded as a testamentary paper and a part of the will, nor operative as a declaration of the

trust intended. If a testatrix devises property to her executors in trust for such persons and objects as she may in writing direct, expressing an intention to execute a codicil, a paper written and signed by such testatrix two days after the will was executed, but not attested, is not good as a declaration of trust in favor of the persons named therein, to whom the executors are directed to turn over the property held by them: *Chase v. Stockett*, 72 Md. 235, 19 Atl. 761. A will, on its face, or by reference to some writing existing at the time the will is executed, and so referred to and identified therein as to become part of it, must declare what enumerated bequests and devises shall be, but also who shall take them, directly, or beneficially through a trustee, and an extraneous writing not so identified is not admissible to aid a trust created by will without naming a beneficiary: *Heidenheimer v. Bauman*, 84 Tex. 174, 31 Am. St. Rep. 29, 19 S. W. 382.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

TURNER v. TURNER.

[123 Ga. 5, 50 S. E. 969.]

EVIDENCE.—Declarations of an Agent are not Admissible Against His Principal, unless made when the agent is engaged in some transaction within the scope of his agency and acting on behalf of his principal. The declaration must be one accompanying an act within the scope of the agency and so nearly connected therewith as to be a part of the res gestae. (p. 77.)

EVIDENCE.—Entries Made by One Whose Duty It is to Make Them in the general course of business are admissible after his death. This rule applies in the case of an agent who makes such entries in the course of the business of his principal. (p. 78.)

EVIDENCE.—Declarations Against Interest by One Since Deceased are admissible in a controversy between third persons. (p. 78.)

EVIDENCE—Declarations of Deceased Agent—Rule of the Georgia Code.—Section 3034 of the Civil Code of Georgia providing that the declarations of an agent as to business transacted by him are not admissible against his principal, unless they are part of the negotiation, and constituting the res gestae, or else the agent be dead, are simply declaratory of the pre-existing law upon the subject, and do not make such declarations admissible in evidence in every case after the death of an agent, but only in those cases in which they were admissible before the adoption of the code. (p. 79.)

EVIDENCE.—If the Declarations of a Deceased Person are Admissible in Evidence as Against His Interest, they must be dealt with as if the witness were on the stand testifying to the facts stated in the declaration. (p. 81.)

EVIDENCE—Communications to an Attorney at Law when Acting as a Loan Agent.—An attorney at law, who is also the agent of a loan company, and expected as such to see that an applicant for a loan has an unencumbered title, and to do other acts which are necessary and proper to secure the acceptance of a loan, is to be regarded merely as an agent of the applicant, selected as such because he is an attorney at law, and he may be permitted to testify to

conversations in his presence between such applicant and her husband in reference to a claim, the payment of which they proposed to make out for the proceeds of the loan. (pp. 82, 83.)

EVIDENCE—Proof of Agency.—An allegation of agency may be proved by showing any state of facts which the law recognizes as establishing an agency. (p. 82.)

Action by Sallie F. Turner against J. D. and Susie B. Turner. He was one of the children of J. W. Turner, deceased. The action was to recover three hundred and sixteen dollars with interest. A mortgage had existed on lands of the decedent, and to provide moneys for its payment, a loan was procured from the plaintiff, and the mortgage, instead of being satisfied of record, was transferred to her as security. The heirs of J. W. Turner, of whom there were four, agreed that the amount advanced by the plaintiff should be divided into four parts, and J. D. Turner, being one of such heirs, his share of the liability was the amount sued for. He subsequently conveyed his share of the property covered by the mortgage to his wife, Susan B. Turner. He procured the plaintiff to execute a release of the mortgage by declaring to her that his wife intended to secure a loan, out of the proceeds of which should be paid the indebtedness due the plaintiff. Though the loan was obtained, the indebtedness was never paid. Declarations of J. D. Turner in negotiating this loan were offered and received in evidence during the trial, both he and his wife having died after the commencement of the suit; and the administrator of the wife excepted and appealed.

M. B. Eubanks, for the plaintiff in error.

Dean & Dean, for the defendant in error.

⁷ COBB, J. 14. It is an ancient and well-established rule of law that the declarations of an agent are not admissible against his principal, unless they were made at a time when the agent was engaged in some transaction within the scope of his agency and was acting in behalf of his principal. To state it otherwise, the declaration must be one accompanying an act within the scope of the agency and so nearly connected therewith as to become a part of the *res gestæ*: Story on Agency, 9th ed., sec. 134 et seq.; 1 Greenleaf's Evidence, 16th ed., sec. 184c; 2 Evans' Pothier on Obligations, 3d Am. ed., 245; Chamberlayne's Best

on Evidence, Int. ed., 487; 1 Ency. Ev. 538 et seq. Such was the recognized rule in this state at the time the Code of 1863 was adopted: *Griffin v. Montgomery etc. R. R. Co.*, 26 Ga. 111; *Sweet Water Mfg. Co. v. Glover*, 29 Ga. 399; *Atlanta etc. R. R. Co. v. Hodnett*, 29 Ga. 461. There is also an equally well-established rule that entries made by one whose duty it is to make them, in the regular course of business, are admissible after his death; and this rule applies in the case of an agent who makes such entries in the course of the business of his principal: 1 *Greenleaf on Evidence*, 16th ed., sec. 120a; *Starkie on Evidence*, 10th Am. ed., 492 et seq.; 4 *Ency. Ev.* 103, 104. Such entries may in many cases be a part of the *res gestæ*; but there are also instances where such would not be the case, but after the death of the agent who made such entries they are nevertheless admissible. There is still another ancient and well-established rule, that declarations against interest by one since deceased are admissible in evidence in a controversy ^s between third persons: 1 *Greenleaf on Evidence*, 16th ed., sec. 147 et seq.; 9 *Am. & Eng. Ency. of Law*, 2d ed., 8; 4 *Ency. Ev.* 87; *Starkie on Evidence*, 10th Am. ed., 474; *Chamberlayne's Best on Evidence*, Int. ed., 453. This rule is set forth in the code in the following language: "The declarations and entries of a person, since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case": *Civ. Code*, sec. 5181. In that section of the code which provides for the admission in evidence of books of account, the rule that the entries of an agent, made in the course of the business, are admissible in evidence after his death is recognized, it being there provided that the person offering the books of account must show either that he kept no clerk, or else that the clerk is dead or inaccessible, or incompetent as a witness: *Civ. Code*, sec. 5182. The code also declares that the "admissions of an agent or attorney in fact, during the existence and in pursuance of his power, are evidence against the principal": *Civ. Code*, sec. 5192. In another section it is declared: "The agent is a competent witness for or against his principal. His interest goes to his credit. The declarations of the agent as to the business transacted by him are not admissible against his principal, unless they were a part of the negotiation, and constituting the *res gestæ*, or else the agent be dead": *Civ. Code*, sec. 3034. If this section be isolated and

no regard paid to other provisions of the code on the subject of the admission of evidence, and no attention paid to the ancient and well-established rules of law referred to, which were of force in this state at the time of the adoption of the first code, the concluding words of the section might be held to mean that the mere fact that the agent was dead would be sufficient to admit in evidence against the principal any declaration made by the agent, without reference to the time or place at which or the circumstances under which the declaration was made. Such a rule would have for its foundation neither principle nor precedent. When we look at other provisions of the code in reference to the admissibility of evidence, and at what were the well-established rules of evidence at the time the code was adopted, we are forced to the conclusion that no such radical change in the law was intended as such a construction would place upon this section of the code. It is in this state a well-established rule of code⁹ construction that a given section will be presumed to be simply a declaration of existing law, unless the language of the section is such as to clearly indicate an intention to establish a new rule: *Mitchell v. Georgia etc. Ry. Co.*, 111 Ga. 760, 768, 36 S. E. 971, 51 L. R. A. 622; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 205, 81 Am. St. Rep. 28, 37 S. E. 485. Of course the words of a section must not be held to be meaningless. The courts have no right by construction to eliminate words which have meaning, simply because the meaning does not agree with the opinion of the court as to what should be the law. Can the words, "or else the agent be dead," be given a meaning and at the same time make the section of the code merely declaratory of existing law? In our opinion this can be done. The first portion of the last sentence of the section was intended to declare the well-settled rule, above referred to, that the declarations of an agent, to be admissible, must be a part of the *res gestæ*. The concluding words of the sentence, "or else the agent be dead," are to be interpreted in the light of those provisions of the law where the declarations of deceased persons are admitted in evidence—that is, if under established rules the declaration of a deceased person would be admissible in evidence, then under the code such declaration would be none the less admissible because the deceased was occupying the relation of an agent

at the time the declaration was made. If the declaration was one made by an entry in the regular course of business, but still not a part of the principal transaction, and therefore not admissible as a part of the *res gestæ*, such declaration would be admissible, if at the time it was offered it was shown that the agent was dead. So if the agent in the regular course of business, but not as a part of the principal transaction so as to be a part of the *res gestæ*, made a declaration which was against his interest, then the fact that he was an agent would not make an exception to the general rule which admits the declarations against interest of a person since deceased. Giving to the words under interpretation this meaning, the provisions of the code on the subject of the admission of the declarations of an agent harmonize with the general rules of law which are stated in the code, and also with the well-established principles of evidence which were of force at the time the code was adopted. So far as the ruling in *Hines v. Poole*, 56 Ga. 638, a decision by two judges, is in conflict with these views, we must decline to follow it.

¹⁰ 5. J. E. Dean, Esq., a witness for the plaintiff was permitted to testify as follows: "In August, 1899, I was riding with Mr. J. Dallas Turner. He and I were on a trip together; and in the course of the conversation he says to me, 'Ed., I am trying to borrow some money for Susie on the property I got from my father's estate, which I have deeded to her. I am trying to borrow twelve hundred or twelve hundred and fifty dollars and in order to do so it is necessary to get the mortgage which Sallie holds [referring to plaintiff] canceled; and out of the money we borrow we will pay her back the part of that twelve hundred dollars that I owe her.' " This evidence was objected to on the ground that there was no evidence showing that J. Dallas Turner was the agent of his wife, the defendant; that it did not appear that the conversation was communicated to the plaintiff or was in the hearing of either party to the case; and that it was immaterial and irrelevant. It appears from the evidence that J. Dallas Turner was dead at the time of the trial. While there is in the record evidence sufficient to authorize a finding that Turner was the agent of his wife, still, for the reasons set forth in the preceding division of this opinion, this evidence would not have been admis-

sible as the declarations of an agent. But we think the testimony was admissible as the declarations of a third party, since deceased, against his interest, made at a time when the litigation could not have been in contemplation. The declarant in terms admits his liability to the plaintiff for a part of twelve hundred dollars. This is clearly a declaration against interest, and sufficient to render not only this portion of the declaration admissible, but also all that was said at the time relating to any fact which was within the knowledge of the declarant or which it was his duty to know. Declarations admitted under this rule of evidence are, at the trial, to be dealt with as if the witness were on the stand testifying to the facts stated in the declaration. If the declarant were in life and called as a witness, he certainly would be allowed to testify that he and his wife were making arrangements to borrow money to discharge a lien upon the land which he had conveyed to his wife, and that out of the money to be borrowed both the husband and wife intended to discharge the lien upon the land. Whether this testimony would be sufficient to show an assumption on the part of the wife of the amount of the lien upon her land would be a question for the jury under all the ¹¹ facts and circumstances of the case; but the evidence was clearly admissible under the rule, to be given such weight as the jury saw proper to give it: See *Massee-Felton Lumber Co. v. Sirmans*, 122 Ga. 297, 50 S. E. 92.

6. W. J. Neel, Esq., was called as a witness for the plaintiff and was permitted to testify to a conversation between J. Dallas Turner and his wife in reference to the payment of the claim of the plaintiff out of money the proceeds of a loan which the witness had negotiated for Mrs. Turner. He was also permitted to testify to other matters in connection with the negotiation of this loan. This evidence was objected to on the ground that the relation of attorney and client existed between the witness and the defendant, and that therefore the witness was not competent to testify in reference to any matter knowledge of which he derived on account of the professional relation claimed to exist between the parties. It appeared that Mr. Neel carried on, in connection with the practice of his profession as an attorney, the business of a negotiator of loans; that he was authorized

by the company which he represented to receive applications for loans; that these applications were transmitted to the company, and if the security offered was satisfactory the loan would be accepted, and the money would be sent to Mr. Neel, who, after deducting such sums as had been agreed upon between him and the applicant for expenses and commissions, would pay over the net proceeds to the applicant. It is clear from the testimony that Mr. Neel bore that relation to the applicant and the loan company which has become so familiar to everyone in this state. He was the agent of the applicant, and not the agent of the lender. But he was expected by the lender, on the acceptance of the application, to see that the applicant had an unencumbered title to the property, and if there were encumbrances it was his duty to see that these encumbrances were removed before any portion of the money was paid over to the applicant. He owed a duty to the applicant, as agent, to do every act that was legitimate and proper to secure the acceptance of the loan. In the performance of these duties it would become necessary for him to exercise his knowledge and information as an attorney at law, but he was really not employed as an attorney, but simply as an agent who, on account of the fact that he was also an attorney, might discharge the duty ¹² that was owing to the applicant without calling for the services of another person. Really, the duties which he was to perform as an attorney were more for the protection of the lender; and if the relation of attorney and client existed at any stage of the transaction, it would be one rather existing between the attorney and the lender than between the attorney and the applicant. The purpose of the applicant was to secure a loan. The person whom she was seeking was a loan agent, and not an attorney, and Mr. Neel's employment was in the capacity of a loan agent rather than in that of attorney at law. The fact that, in discharging the duty that he owed to the applicant as a loan agent, the performance of a duty which could be fulfilled only by an attorney might to some extent be involved would not make the relation one of attorney and client rather than that of principal and agent. The main employment was to secure a loan, and it was not at all necessary that the agent for this purpose should be an attorney at law. It was merely an incident to the performance

of the duties of the loan agent that the knowledge of the law had to be invoked; and while the agent might do that which only an attorney at law could do, incidental to the completion of the purpose for which he was employed as agent, this incident to the agency would not destroy the relation of simple principal and agent and make the relation one of attorney and client. This was the view taken by this court in *Skellie v. James*, 81 Ga. 419, 8 S. E. 607, in which the testimony of Judge Miller, who occupied a relation to the transaction then under investigation similar to that which Mr. Neel occupied in the present case, was held to be admissible. In *Freeman v. Brewster*, 93 Ga. 652, 653, 21 S. E. 165, where it was held that the testimony of an attorney at law was not admissible, the case of *Skellie v. James*, 81 Ga. 419, 8 S. E. 607, was distinguished, upon the ground that it there appeared that the knowledge of the attorney as to the loan about which he was introduced as a witness was acquired, not as attorney for the borrower, but as attorney for the lender, who was not a party to the case: See also, in this connection, *Jackson v. Bennett*, 98 Ga. 106 (2), 26 S. E. 53; *Stone v. Minter*, 111 Ga. 45 (1), 36 S. E. 321, 50 L. R. A. 356.

7. The charge of the judge contained the rules as to a principal being bound by the ratification of unauthorized acts of his agent, and as to the liability of an undisclosed principal. Error was assigned upon these portions of the charge, upon the ground that ¹⁸ there were no averments in the petition authorizing such instructions. The petition charged in terms that J. D. Turner was the agent of Susie B. Turner in reference to the matters as to which the plaintiff sought to hold her liable; and this allegation could be proved by showing any state of facts which the law would recognize as establishing agency; and as there was evidence tending to establish each of the propositions referred to in the instructions, there was no error in the portions of the charge complained of.

8. The foregoing discussion embraces such of the assignments of error as require any elaborate notice. The plaintiff's case was predicated upon the theory that J. D. Turner was the agent of Susie B. Turner. While there was an allegation that J. D. Turner was insolvent, this was an unnecessary and immaterial allegation, and the failure to sus-

tain it by proof would not cause the plaintiff's case to fail, if the other averments which were material were established to the satisfaction of the jury. The charge, when construed as a whole, fairly submitted to the jury the controlling issues in the case, and those portions which were excepted to were not erroneous for any of the reasons assigned. The requests to charge, so far as legal and pertinent, were covered by the general charge. If there was any error at all in the charge, or in the rulings on evidence, such error was not of sufficient importance to require the granting of a new trial. There was evidence upon which a finding that J. D. Turner was the agent of Susie B. Turner in the transaction involved could properly be based; and this appearing to have been the second verdict in the case, and one which seems to us to be so consistent with the real truth and justice of the case, we do not think there was any sufficient reason, either for the trial judge to grant a new trial, or for us to control whatever discretion he may have had at this stage of the case in overruling the motion for a new trial.

Judgment affirmed.

All the justices concur, except Candler, J., absent.

The Declarations of an Agent within the scope of his authority, and relating to a transaction then being performed by him as agent, are admissible in evidence against his principal: *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134; *Carney v. Hennessey*, 74 Conn. 107, 92 Am. St. Rep. 199. When otherwise made, however, they are not usually admissible: *Taylor v. Commercial Bank*, 174 N. Y. 181, 95 Am. St. Rep. 564; *Whitney v. Wagener*, 84 Minn. 211, 87 Am. St. Rep. 351.

The Declarations of a Deceased Person, whether verbal or written, are admissible in evidence as between third parties, when it appears that the declarations were against his pecuniary interest and were of a fact in relation to a matter of which he was presumably cognizant, and that he had no probable motive to falsify the fact declared: *Halvorsen v. Moon etc. Lumber Co.*, 87 Minn. 18, 94 Am. St. Rep. 669, and see the monographic note thereto.

SMITH v. McWHORTER.

[123 Ga. 287, 51 S. E. 474.]

TRUST, When Does not Extend to Estate of Remainderman.—

If there is no need of a trustee to protect and preserve the interest of those who are to take by way of remainder, a trust will be limited to the life estate. (p. 87.)

REMAINDER, When a Legal and not an Equitable Estate.—

If a conveyance is made to a trustee in trust to one for life and after the death of the life tenant to such child or children as she may leave, the remainder is a legal and not an equitable estate. (p. 87.)

TRUST, When Becomes Executed by the Married Woman's Act.

Under a deed executed after the married woman's act of 1886, purporting to convey property to a designated grantee in trust for M. A. S., a married woman, and on her decease for such child or children or representatives of child or children born of her and her husband as she may have, the trust was executed on the delivery of the deed, and the complete title to the life estate vested in M. A. S. (p. 89.)

TRUSTEE, When Does not Represent Remaindermen.—

Where a conveyance purports to convey property to be held in trust for a married woman and, after her death, for her child or children, the estate in remainder is a legal estate, which the trustee does not represent, and an order of sale made on his application is void. (p. 89.)

REMAINDERMEN—Limitation of Actions.—

The right of action of remaindermen does not accrue until the death of the life tenant, and possession cannot be adverse to them prior to the accruing of their cause of action. (p. 89.)

REMAINDERS —Limitation of Actions.—

Where a Life Tenant Assumes to Make a Sale of the Property, the remaindermen who do not participate are not bound to proceed against the purchaser or give him notice until the accrual of their cause of action. (p. 90.)

JUDICIAL SALE, Void, What Does not Amount to a Ratifica-

tion of.—Where a trustee's sale under order of court is void as to certain infant remaindermen, they do not, by living with their father on lands procured with the proceeds of such sale and being supported therefrom during their minority and by briefly occupying such land after the termination of the life estate and the accrual of their cause of action, ratify such sale. (p. 91.)

Action to recover possession of certain lands. These lands, in September, 1869, belonged to Sarah Finch, who executed a conveyance purporting to grant them to John F. Smith, the husband of Mary A. Smith, "unto the said John F. Smith for the use, benefit, and advantage, in trust for said Mary A. Smith for life, exempt from the marital rights of said John E. Smith, or any future husband, for her sole and separate use, and on her decease to such child or children, or representative of child or children, born of the said John F. Smith and the said Mary A. Smith, as

she may leave in life.” In 1875, John F. Smith, purporting to act as trustee for his wife and children, petitioned a judge of the northern circuit, praying leave to sell the trust estate and reinvest the proceeds of the sale in a tract of land belonging to the petitioner and which was represented to be a more suitable place in which to rear children. On the following day the chancellor granted the prayer of the petition, on condition that a guardian ad litem appointed to represent the children should consent in writing to the sale and reinvestment. This assent was subsequently procured, and the trust property sold to J. H. McWhorter, to whom a deed was executed pursuant to such sale. When this deed was executed Mary A. Smith was more than twenty-one years of age. She died in December, 1900, leaving five children, who, on March 31, 1902, and after the death of their father, brought the present action. In December, 1876, J. H. McWhorter conveyed to Joseph McWhorter. The defendants relied upon the sale thus made and upon the fact that the plaintiffs had knowledge of the occupancy by Joseph McWhorter of the lands sued for from 1876 to the beginning of the suit. While they remained members of their father’s family, they were supported from the tract of land which he had purchased with the proceeds of the trustee’s sale. The trial court directed a verdict for the defendants. The plaintiffs appealed.

Samuel H. Sibley, for the plaintiffs.

W. M. Howard and Hamilton McWhorter, for the defendants.

289 EVANS, J. 1. The rights of the parties in the present litigation very largely, if not entirely, depend on the construction of the deed from Sarah Finch to John F. Smith, trustee, executed on the second day of September, 1869. A copy of this deed appears in the statement of facts. At the 290 time the deed was made, Mary A. Smith, the life tenant, was an adult. The practical question is, whether, by the terms of this deed, a trust estate was created for the life tenant and the remaindermen, executory at least until the death of the life tenant; or was the trust limited to the life estate and executed by the “married woman’s act” immediately on the signing and delivery of the trust deed? It is a general rule, upon which “the authorities all con-

cur, that in creating a trust estate, the trustee, without words of inheritance—and in the case of wills with them—takes only such quantity of estate as is necessary for the purposes of the trust”: *East Rome Town Co. v. Cothran*, 81 Ga. 361, 8 S. E. 737. If there is no need of a trustee to protect and preserve the interests of those who are to take by way of remainder, the trust will be limited to the life estate. As was pointed out in *Fleming v. Hughes*, 99 Ga. 448, 27 S. E. 791, before the code a trust was necessary to preserve a contingent remainder, because such a remainder might be defeated by the premature termination of the precedent estate; but since the code, as no particular estate is necessary to sustain a remainder, the defeat of the particular estate for any cause does not destroy the remainder. It is not, therefore, necessary to interpose a remainder to trustees to preserve a contingent remainder. Hence it has often been held that a conveyance to a trustee in trust for one for life, and, after the death of the life tenant, to such children as the life tenant may leave living at the time of her death, created a trust only for the life estate, and that the remainder was a legal and not an equitable estate: *Tillman v. Banks*, 116 Ga. 250, 42 S. E. 517, wherein the prior cases on this subject are collated: See, also, *Luquire v. Lee*, 121 Ga. 624, 49 S. E. 834; *Stiles v. Cummings*, 122 Ga. 635, 50 S. E. 484. A grantor may convey the title to the remainder estate to the trustee; and the trustee, in such cases, will hold the legal title to the remainder estate until the trust becomes executed: *Askew v. Patterson*, 53 Ga. 209; *Ford v. Cook*, 73 Ga. 215; *Knorr v. Raymond*, 73 Ga. 749; *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46; *Moore v. Sinnott*, 117 Ga. 1010, 44 S. E. 810, 113 Ga. 908, 39 S. E. 415. Likewise a grantor, while not expressly conveying to the trustee the title to the remainder estate, may create a duty in the trustee with respect to the estate in remainder, so as to convert the legal estate into an equitable one and make the trust executory until the duty may be performed under the terms²⁹¹ of the trust. Thus, if the instrument creating the trust imposes upon the trustee the duty of making division among indeterminate remaindermen after the termination of a precedent life estate, the trust is executory pending the existence of the life estate: *Riggins v. Adair*, 105 Ga. 727, 31 S. E. 743; *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46. Or, if the trustee is expressly empowered to act and manage

the property for the life tenant and for the infant or contingent remaindermen, the trust is executory until the life estate is determined: *Johnson v. Cook*, 122 Ga. 524, 50 S. E. 367. Generally, where the title is conveyed to a trustee in trust for a life tenant, with a remainder over, where no express trust for those who are to take in remainder is created nor any duty imposed on the trustee with respect to the estate in remainder, such remainder is a legal and not an equitable estate. The mere fact that the remainder estate may be contingent does not necessarily convert it into an equitable estate: *Mitchell v. Turner*, 117 Ga. 959, 44 S. E. 17. The contingency of the remainder, however, is always an important factor in construing the character of the estate passing to the trustee, in the effort to arrive at the true intent of the grantor.

The cases of *Thomas v. Crawford*, 57 Ga. 211, and *Jennings v. Coleman*, 59 Ga. 718, are distinguishable from the case at bar. In both cases the issue presented for determination arose upon the levy of a fi. fa. upon the interest of the tenant for life, and a claim by the trustee. In the first case the bequest of the property was to the trustee, who was to pay over the rents, issues, and profits annually to the person who it was contended owned a life estate. By the will the corpus of the estate was expressly devised to the trustee; he was to have possession of the land, was to manage it and pay the income annually to Howard, and upon Howard's death the trustee was to deliver possession to those entitled in remainder. The phraseology of the will clearly indicated that the testator intended that the trustee should represent the whole estate during the life of Mr. Howard, and that the trust was to be executory so long as he lived. In the latter case the property conveyed by the deed before the court was subjected to the same trusts, uses, and conditions as were contained in the will of the father in law of the grantor; and it was held that the deed, interpreted and construed with the will, created an executory trust. This case is controlled by its ²⁰² own special facts, and the conclusion reached was the result of an attempt to give effect to the two instruments so as to effectuate the grantor's interest. Discarding all technicalities, the plain and manifest intent of the grantor in the deed before us was to create a trust for the life estate only. No express

trust was created for the remaindermen; no powers were conferred on the trustee, and no duty imposed for the benefit and protection of the remaindermen. The evident purpose of the grantor in conveying the title to the life estate to a trustee was to protect the life tenant against the marital rights of the husband. This deed was made shortly after the enactment of the "married woman's act of 1866," and at that time the emancipation of a married woman's property was hardly appreciated by the public. As to her separate estate the wife was then a feme sole, and the husband's marital right of reducing to possession the wife's property and in this way acquiring the title thereto no longer existed. Only the naked legal title to the life estate passed to the trustee; the estate in remainder was a purely legal estate. As no trust at the date of this deed could be created for an adult married woman, the trust was executed on the delivery of the deed, and the complete title to the life estate vested in Mary A. Smith. The trustee represented neither life tenant nor remaindermen, and having no duty to perform, the trust was executed: *Tillman v. Banks*, 116 Ga. 250, 42 S. E. 517.

2. The estate in remainder being a legal estate, the trustee did not represent the remaindermen, and the judge of the superior court had no jurisdiction in chambers, on the application of the trustee, to authorize the sale of the interest of the remaindermen: *Milledge v. Bryan*, 49 Ga. 397; *Knapp v. Harris*, 60 Ga. 398; *Rogers v. Pace*, 75 Ga. 436; *Pughsley v. Pughsley*, 75 Ga. 95; *Taylor v. Kemp*, 86 Ga. 181, 12 S. E. 296; *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791. The order of sale being without authority of law, the sale thereunder was necessarily void.

3. This suit was instituted within two years of the death of Mrs. Smith, the life tenant. As the trustee did not represent the remaindermen, their right of action did not accrue until the death of the life tenant; and the possession of the defendants was not adverse to the plaintiffs until they had their cause of action: *Luquire v. Lee*, 121 Ga. 634, 49 S. E. 834.

²⁹³ 4. The defendants further pleaded that if the title did not vest in the trustee by virtue of the deed from Finch to Smith, trustee, but vested in the life tenant and the remaindermen, they and their predecessors in title had full

and complete possession of the premises since the date of the deed from Smith, trustee, to J. H. McWhorter (February 24, 1876), with the knowledge and consent of the remaindermen, who after their maturity enjoyed the proceeds of the sale. We have already pointed out that the trustee was not vested with the title to the land under the Sarah Finch deed. Under this deed Mary A. Smith took a life estate and the plaintiffs the estate in remainder. The trustee's sale was absolutely void. Whether the life tenant was estopped from denying the legality of that sale or had ratified it does not enter into the present controversy. She died without having disaffirmed it, and the litigation is between the grantees of the purchaser at that sale and the remaindermen, whose estate did not come into possession until after the life tenant's death. The rule in such cases is that remaindermen who do not participate in the sale by the life tenant are not bound to proceed against the purchaser or give him notice until the accrual of their title: *Parker v. Chambers*, 24 Ga. 518. Before an estoppel can be urged against the remaindermen, they must have done some act whereby they derived a benefit or prejudiced another. It is quite evident, from the allegations of the plea, that the purchaser at the sale relied upon the validity of the decree of sale and the deed executed by virtue of and conformably with the decree. It is not even hinted that the remaindermen acted in any way to induce the purchase. The plea discloses that the ages of the remaindermen at the date of the filing of the plea ranged from twenty-seven to thirty-five years. The plea was filed in the year 1902, and the sale occurred in 1876; so that the oldest of the plaintiffs was approximately nine years of age when the decree was entered. In a case where a trustee for two persons sells and conveys the whole property in fee, purporting to act as trustee for one only, and a part of the price or of the proceeds of the sale passes from the trustee to the beneficiary not named in the transaction, such beneficiary must refund the same to the purchaser, or to those holding under him as subsequent purchasers, before he will be allowed to recover the whole of his interest in ²⁹⁴ the trust estate so sold and conveyed: *Bazemore v. Davis*, 55 Ga. 504. Also, where a trustee for the life tenant, who does not represent the remaindermen, sells and conveys the entire fee, and the re-

maindermen receive a part of the proceeds of the sale, they must refund the amount so received before they can recover the whole estate in remainder: *Luquire v. Lee*, 121 Ga. 636, 49 S. E. 834. In the case before us the life tenant died in 1900, and suit was brought by the remaindermen fifteen months thereafter. Of course they cannot hold the land conveyed to the trustee in exchange for the land conveyed by him, and also recover the land which the trustee conveyed. Their action in suing for this land so soon after the life tenant's death amounts to a disaffirmance and repudiation of the sale by Smith, trustee, to McWhorter. It is familiar doctrine that to bind one by a ratification of an illegal or void act, it must be shown that he had full knowledge, at the time of the alleged ratification, of the facts which would make such act illegal and void; and the burden of proving ratification is upon the person asserting it: *De Vaughn v. McLeroy*, 82 Ga. 688 (4), 10 S. E. 211. The bare fact that the plaintiffs lived on the exchanged land as members of their father's family and were supported by their father from the proceeds thereof would not amount to ratification of the sale. Their father owed them a support during their minority, and the acceptance, after majority, of their father's bounty would not be a ratification of an illegal and unauthorized sale of their land. Neither would their brief occupancy of the exchanged land after the accrual of their right to sue ratify the illegal sale, unless something else was done by them to indicate their adoption and approval of the sale under the decree. Nothing of this kind was alleged in the plea, and the court should have stricken the same on demurrer.

Inasmuch as the trial judge held contrary to some of the principles of law herein enunciated, a new trial is ordered. Judgment reversed.

All the justices concur, except Simmons, C. J., absent.

The Trustee of an Active Trust, irrespective of the estate the instrument purports to convey, will take thereunder precisely that quantum of legal estate which is necessary to the discharge of the declared powers and duties of the trust, no more and no less; so that if the instrument imports a larger estate than is thus essential, it is cut down to the measure of the exigencies of the trust; as where the conveyance to the trustee is in fee, and the trusts require only a life estate, only a life estate is vested in him; and if the conveyance is, in terms, of a life estate, and a fee in the trustee is necessary, his estate is expanded or enlarged into a fee: *Robinson v. Pierce*, 118 Ala. 273, 72

Am. St. Rep. 160. See, also, *Melick v. Pidcock*, 44 N. J. Eq. 525, 6 Am. St. Rep. 901.

Adverse Possession against remaindermen is discussed in the monographic note to *Allen v. De Groodt*, 14 Am. St. Rep. 635-638. As a rule, the possession of the life tenant cannot be deemed adverse to the remainderman: *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, and cases cited in the cross-reference note thereto.

JOHNSON v. AETNA INSURANCE COMPANY.

[123 Ga. 404, 51 S. E. 339.]

PRINCIPAL AND AGENT.—The knowledge of an agent as to a material fact bearing upon the validity of a contract made on behalf of his principal is imputed to the latter, and this rule applies to contracts of insurance. (pp. 93, 94.)

INSURANCE—Conditions, When Restricted to Acts Occurring Before the Delivery of the Policy.—Conditions which enter into the validity of a contract of insurance at its inception may be waived by the agent, and are waived if so intended, though they remain in the policy when delivered, and limitations therein on the authority of the agent to waive such conditions otherwise than in writing attached to or indorsed upon the policy, refer to waivers made after its issuance. (p. 97.)

INSURANCE—Condition of Title not Mentioned in nor Indorsed on the Policy—Estoppel.—Where an agent when taking an application for insurance is informed that the building to be insured belongs to the assured but is situated on leased property, and subsequently issues and delivers the policy, the insurer is estopped from relying on a condition therein that it, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void, if the subject of insurance be a building on ground not owned by the insured in fee simple, although the policy further provides that no officer, agent, or other representative shall have power to waive any provision or condition therein except such as by the terms of the policy may be the subject of an agreement indorsed thereon or added thereto, and as to such provisions and conditions, no officer, agent or representative shall have power or be deemed to have waived such provision or condition, unless such waiver shall be in writing upon or attached thereto, nor shall any provision or permission affecting insurance under this policy exist or be claimed by the insured unless so written or attached. (pp. 97, 98.)

Humphreys & Humphreys, Park & Payton and Z. D. Harrison, for the plaintiff.

T. H. Parker and Shipp & Kline, for the defendant.

405 **CANDLER, J.** This was an action on a policy of fire insurance. The court below sustained a demurrer to the plaintiff's petition, and he excepted. From the petition as amended it appeared that one of the conditions of the policy was as follows: "This entire policy, unless other-

wise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." The policy also provided that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto. And as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any provision or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached." The building insured belonged to the plaintiff, but the land on which it was situated did not. It was alleged, however, that when he made application for insurance he expressly informed the agent of the defendant company as to the character of his ownership of the property sought to be insured; "that when he [plaintiff] signed said application, in answer to the question as to the ownership of the land neither 'no' nor 'yes' was written in said application"; and "if said question was answered in the affirmative, it was inserted after petitioner had signed said application, without his knowledge, consent, or authority"; and ⁴⁰⁶ that "said application was signed at the request of the agent of defendant company, who filled out the answers to all questions that were filled out." It will be seen that the controlling question for decision is whether, under the allegations of the petition as amended, the defendant, by reason of the knowledge of its agent as to the real character of the plaintiff's ownership of the property, is estopped to defend on the ground of the plaintiff's noncompliance with the conditions of the contract of insurance, or whether the plaintiff, by accepting the policy on those conditions, and with notice of the limitation on the power of the agent to make a waiver for the company, is precluded from recovering on the policy. There is no principle of law more firmly established than that, in general, the knowledge of an agent as to a material fact bearing upon the validity of a contract made on behalf of his principal

is imputable to the principal; and this principle has uniformly been applied by our court in actions on contracts of insurance: *Carrugi v. Atlantic Ins. Co.*, 40 Ga. 135, 2 Am. Rep. 567; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Greenwich Ins. Co. v. Sabotnick*, 91 Ga. 719, 17 S. E. 1026; *Swain v. Macon Ins. Co.*, 102 Ga. 96, 29 S. E. 147. It has also been held that where a policy contained a stipulation identical with the one in the present case, limiting the power of any agent of the company to make a waiver for the company, and providing that any waiver, to be valid, must be indorsed in writing on the policy, the insured cannot in an action on the policy excuse his failure to comply with the conditions of the contract: *Lippman v. Aetna Ins. Co.*, 108 Ga. 391, 75 Am. St. Rep. 62, 33 S. E. 897, 120 Ga. 247, 47 S. E. 593; *Reese v. Fidelity Life Assn.*, 111 Ga. 482, 36 S. E. 637; *Mutual Life Ins. Co. v. Clancy*, 111 Ga. 865, 36 S. E. 944; *Mutual Reserve Assn. v. Stephens*, 115 Ga. 192, 41 S. E. 679. In the *Lippman* case the policy provided that it should be void "if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy"; and the plaintiff sought to set up a waiver of this condition by showing that, subsequently to the issuance of the policy, an agent of the company had given him oral permission to procure other insurance on the property. In the *Reese*, *Clancy*, and *Stephens* cases, which were actions on policies of life insurance, the waiver sought to be set up was as to a provision that the policy should not become binding ⁴⁰⁷ upon the company until the first premium had been paid during the good health of the insured. Unquestionably, as to a matter concerning the time when the contract is to become of force, or as to the waiver of the conditions of the policy subsequently to its issuance, the insured, by accepting the policy, would be bound by its terms, and could not set up a waiver which he was bound to know the company's agent had no power to make. But that is not this case. Here the insured made written application for a policy of fire insurance. Upon being asked the question as to the character of his ownership of the property, he frankly informed the agent with whom he was dealing that he owned the building but did not own the land. There is no intimation in the petition that the insured was on notice, before re-

ceiving the policy, that the agent had no power to write the insurance with the title to the property held as it was. There is nothing from which an inference can be drawn that the agent and the insured colluded to defraud the insurance company by concealing the truth as to the ownership of the property. On the contrary, the pleader is emphatic in his declaration of his entire good faith and candor throughout the transaction. The knowledge of the agent being imputable to the company, and the company having, notwithstanding the provision of the policy that it should be void if the building was situated on land not owned by the insured in fee simple, entered into a contract with the plaintiff with its eyes open as to his ownership of the property, should it not be estopped, in a suit on the policy, to take advantage of a fact which it well knew when the contract was executed? To answer this question in the negative, it seems to us, would be to permit one party to a contract to receive all the benefits of the instrument, with full knowledge on his part from the beginning that it could not be enforced against him, and refuse absolutely to perform any of the conditions imposed by the contract upon him. To state such a proposition is to demonstrate its entire lack of equity.

Two cases are relied on by counsel for the insurance company, as opposed to the view which is now announced. In *Thornton v. Travelers' Ins. Co.*, 116 Ga. 122, 94 Am. St. Rep. 99, 42 S. E. 287, it was held that "where in a policy of insurance there is an express stipulation that 'no agent has power to waive any condition of this policy,' the insured by ⁴⁰⁸ an acceptance of the policy is estopped from relying upon any agreement made with an agent, having the effect of waiving one of the conditions enumerated in the policy." In that case the policy provided that the insurance should not cover injuries or death resulting wholly or in part, directly or indirectly, from hernia; and it appeared that the plaintiff told the agent of the company to whom the application for the policy was made, at the time of making the application, that he had hernia, and that the agent told him that it was not necessary to state that in his application—that the company did not require it. There is possibly a shadowy distinction between that case and the case at bar, on the idea that in the *Thornton* case the plaintiff colluded with the agent to de-

fraud the company by concealing from it the fact that he had hernia, while in the present case there was nothing in the petition as amended to indicate that the plaintiff was guilty of either actual or constructive fraud. The writer confesses that he does not derive much comfort from this distinction, and candidly asserts his belief that the Thornton case is wrong, in that it applies the doctrine of estoppel to the wrong party to the contract. The decision in the case cited is based upon the authority of the case of *Porter v. Home Friendly Soc.*, 114 Ga. 937, 41 S. E. 45, which decided, in effect, that where a life insurance policy contained a stipulation that "no agent has authority in any manner to make, alter, or discharge contracts," the beneficiary was not entitled to maintain an action against the company on the theory that one of its agents had an agreement with the beneficiary to the effect that if the latter would pay the premiums, etc., for a specified number of years, the amount of the policy would then be paid to her. We fail to see how the Porter case can be deemed authority for the ruling in the Thornton case; for in the former the plaintiff sought to set up an entirely different contract from the one evidenced by the insurance policy, which of course could not be done; while in the latter the plaintiff sued strictly on the contract set out in the policy, but sought to show a waiver by the company of one of its conditions. The case of *Butler v. Standard Guaranty Co.*, 122 Ga. 371, 50 S. E. 132, is not in point, for in that case the court did not consider the question of the right of the defendant to set up the failure of the plaintiff to comply with the conditions of the contract. The plaintiff there ⁴⁰⁹ sought to rescind the contract on the ground that she was induced to sign it by reason of representations of the defendant's agent not embodied in the contract; and it appeared that the plaintiff was on notice that no agent had power to bind the company by any statement not contained in the contract. The case of *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 94 Am. St. Rep. 99, 42 S. E. 287, is, so far as we know, the only Georgia case which goes to the extent of holding that where the insurance company is on notice, at the time of entering into the contract, that the insured has not complied with some of the conditions of the policy, and yet with that knowledge issues the policy to him, it will be heard to defend on

the ground of such noncompliance with the conditions; and it is in direct conflict with the earlier case of *Mechanics' Ins. Co. v. Mutual Bldg. Assn.*, 98 Ga. 262, 25 S. E. 457, which, however, together with the cases of *Clay v. Phoenix Ins. Co.*, 97 Ga. 44, 25 S. E. 417, and *Phenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779; we are asked to review and overrule. So far as appears from the report, the *Clay* and *Searles* cases did not involve any question as to the effect upon the plaintiff's rights of a stipulation in the policy limiting the power of an agent of the company to waive the conditions of the policy; and as they do not stand in the way of the contentions of counsel, it will be unnecessary to review them. The first case mentioned, however, had to do with a policy containing a stipulation as to waiver, almost identical with the one in the present case; and it follows that if that case is reaffirmed, the *Thornton* case must yield to it as authority. In the case in 98 Ga., the court, Mr. Chief Justice Simmons delivering the opinion, said (page 266): "'Conditions which enter into the validity of a contract of insurance at its inception may be waived by the agent, and are waived if so intended, although they remain in the policy when delivered'; and limitations therein upon the authority of the agent to waive such conditions, otherwise than in writing attached to or indorsed upon the policy, are treated as referring to waivers made subsequently to the issuance of the policy": Citing 1 May on Insurance, sec. 143, and authorities there cited.

The language quoted fits the present case like a glove; and upon the soundness of the principle announced must depend the decision of this case. A careful study convinces us that the logic of that case is unanswerable. An insurance company receives ⁴¹⁰ an application for a policy. One of the rules of the company is that insurance will not be issued upon a building situated on land not owned by applicant. But the company, through its agent, knows that the applicant owns the building which he wishes to have insured, but does not own the land on which it is situated; and with this knowledge nevertheless issues a policy on the building. Certainly, after leading the applicant to believe that he would be protected, and receiving from him the premiums charged for the insurance, it should not in good conscience be heard to set up, in defense to

an action on the policy, that the ownership of the building and of the land were in different persons. True, the policy states on its face that no agent has the power to waive any of the conditions of the policy, and that none of them will be deemed to have been waived unless such waiver is attached to or indorsed upon the policy in writing. But this is not a question of waiver, so much as of notice and estoppel. The agent's knowledge, as has been seen, is the company's knowledge. In spite of the assertion in the policy that the contract shall be void if the ownership of the property is of a given character, the policy has been issued with notice to the company that the ownership is of that character. Regardless of any question of waiver, then, the company has placed itself in a position where it would be inequitable to allow it to make the defense which it seeks. "Waiver is sometimes the express abandonment of a right. More frequently it is implied from acts that are inconsistent with its continued assertion. . . . Estoppel is the shield of justice interposed for the protection of those who have not been wise or strong enough to protect themselves. It is the special grace of **the court**, authorized and permitted to preserve equities that would otherwise be sacrificed to cunning and fraud": Ostrander on Fire Insurance, sec. 366. As to matters arising subsequently to the issuance of the policy, the case wears a different aspect. The contract is then made, and both parties are on notice as to its terms. The insured is bound to know what are the rights of the company, and that none of them can be relinquished save in the manner pointed out in the policy; and he, on his part, will not be heard to urge a waiver by the company, unless it has been made in the manner required. Our conclusion is that the ruling in the case of *Mechanics' Ins. Co. v. ⁴¹¹ Mutual Bldg. Assn.*, 98 Ga. 262, 25 S. E. 457, is sound; that it is controlling of the case at bar; and that anything to the contrary in the case of *Thornton v. Travelers' Ins. Co.*, 116 Ga. 122, 94 Am. St. Rep. 99, 42 S. E. 287, must yield as authority to the earlier case.

Judgment reversed.

All the justices concur, except Simmons, C. J., absent.

COBB, J., concurring. There is an irreconcilable conflict between the cases of *Mechanics' Ins. Co. v. Mutual Bldg. Assn.*, 98 Ga. 262, 25 S. E. 457, and *Thornton v. Trav-*

elers' Ins. Co., 116 Ga. 122, 94 Am. St. Rep. 99, 42 S. E. 287; and therefore the ruling in the former case must control, unless it is reviewed and overruled. That case was not called to the attention of the court when the decision in the Thornton case was rendered. The case in the 98th Ga. was decided upon authority, and it must be conceded that it is abundantly supported. The ruling in the Thornton case seems, however, to the writer to be the better view, although candor requires an admission that there is little authority in support of it. As the other members of the court do not think that the case in the 98th Ga. should be overruled, the writer concurs in the judgment upon the authority of that case, being bound thereby. I am authorized to say that Mr. Presiding Justice Fish agrees with this view.

OF THE WAIVER OF STIPULATIONS THAT CONDITIONS AND FORFEITURES IN INSURANCE POLICIES SHALL NOT BE WAIVED OR SHALL BE WAIVED IN WRITING ONLY.

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I. General Rules Applicable to.

a. Validity of the Stipulation.

1. Where Charter or Other Law Limits the Action of the Insurer.—The businesses of transportation and of insurance have been equally fertile in expedients to limit the corporations transacting them from liability to the public, or, at least, the great portion thereof so frequently brought into contract relations with them; and, so far as insurance is concerned, the recourse for this purpose has chiefly been to stipulations undertaking to restrict the mode in which the business shall be conducted, and more frequently to limit the acts which may be done by agents and the manner in which the doing of them may be evidenced. The policies issued usually contain numerous conditions, some relating to facts existing at or prior to their issuance, and others to facts which may arise subsequently, and all declaring that some designated fact shall avoid the policy, unless consented to or waived by the insurer, and that such consent or waiver can be accomplished only by specified agents acting in a particular mode, such mode usually being by a clause, memorandum, or indorsement in writing contained in, or written upon, the policy. Stipulations of the class here under consideration have given, and must continue to give, rise to boundless litigation, the results of which it is not always easy, or even possible, to reconcile, and which are, nevertheless, not so essentially discordant as, on first impression, they seem to be.

It cannot be successfully maintained that a corporation may not, as well as a natural person, limit its agents, and restrict their authority and mode of action, provided always that fraud cannot be

legalized, nor can the corporation deprive itself of powers, clearly granted to it by its charter, or other law, including the right to exercise those powers, as it must, by agents selected by it.

Perhaps the clearest instance of the validity of a restriction upon the action of a corporate insurer or of its agents, is presented when the restriction is found in the charter of the corporation, or in some other law confessedly applicable to it. The only question then arising relates to the construction of the charter, or other law, and its constitutionality, if found applicable to the case before the court. Thus, where the charter of an insuring corporation declared that if there shall be any other insurance upon the whole or any part of the property insured by the policy, it shall be void unless such double insurance shall exist by consent of the company indorsed on the policy, under the hand of its secretary. It was held that this provision was not made solely for the benefit of the corporation, but to guard the public against the evils and dangers of over-insurance, and hence that the corporation could not waive the condition in any other mode than that pointed out by its charter: *Couch v. City Fire Ins. Co.*, 38 Conn. 181, 9 Am. Rep. 375; *Leonard v. American Ins. Co.*, 97 Ind. 290; *Hale v. Mechanics' Mut. Fire Ins. Co.*, 6 Gray, 169, 66 Am. Dec. 410; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Stark County Mut. Ins. Co. v. Hurd*, 19 Ohio, 149.

2. **Stipulations Affecting Designated Agents, or Classes of Agents, but Leaving the Corporation Power of Action.**—An insurer, whether a natural or an artificial person, may limit the authority of its agents, and provide the manner in which such authority may be exercised, and the mode in which the action may be evidenced. Where the restriction is contained in the policy, or otherwise brought to the notice of the insured, he is bound thereby, and cannot insist that the insurer shall be bound by the acts of its agent, the authority to do which was withheld from him. Even the manner of the doing of an act may be made the measure of his power, and an act done by him in a different manner may be held not binding on his principal, where there is nothing to indicate that such principal, acting through properly constituted agents, has not waived the restriction imposed by it upon the agent in question: *Clevenger v. Mutual Life Ins. Co.*, 2 Dak. 114, 3 N. W. 313; *Porter v. Home Friendly Soc.*, 114 Ga. 937, 41 S. E. 45; *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 94 Am. St. Rep. 99, 42 S. E. 287; *Ruthven v. American Fire Ins. Co.*, 92 Iowa, 316, 60 N. W. 663; *Dryer v. Security Fire Ins. Co.*, 94 Iowa, 471, 62 N. W. 798; *Insurance Co. v. Gibbons*, 43 Kan. 15, 22 Pac. 1010; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; 71 Mich. 414, 15 Am. St. Rep. 275, 39 N. W. 571; *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302, 308, 51 N. W. 455, 52 N. W. 754; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; *Sprague v. Western Home Ins. Co.*, 49 Mo. App. 423; *Catoir v. American Life Ins. etc. Co.*, 83 N. J. L.

487; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *Stewart v. Union Mut. Life Ins. Co.*, 76 Hun, 267, 27 N. Y. Supp. 724; *Union Central Life Ins. Co. v. Hook*, 62 Ohio St. 256, 56 N. E. 906; *Northwestern National Ins. Co. v. Mize* (Tex. Civ. App.), 34 S. W. 670; *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682, 6 Am. St. Rep. 144, 15 Atl. 353, 1 L. R. A. 216; *Hartford Fire Ins. Co. v. Small*, 66 Fed. 490, 14 C. C. A. 33, 30 U. S. App. 337.

3. **Stipulations Undertaking to Deprive all Agents of Power.**—The business of insurance is usually transacted by corporations, and as they cannot act otherwise than by agents, every stipulation purporting to deprive all their agents of authority to act for them in the waiver of a condition or a forfeiture must, if valid and interpreted literally, deprive the corporation of the power to act at all; or, in other words, shut it off, by its own act, from the power and duty of discharging its corporate functions, or, at least, a very substantial portion thereof. We doubt whether a condition, purporting to deprive every officer and agent of an insuring corporation of authority to act for it in any particularly specified manner, should be held void, though it may, perhaps, be of little or no obligation, for it must in each case leave open the question, the same as if it were not there, of whether the agent who undertook to act did in fact represent his principal in what he did. Beyond question, no stipulation or condition purporting to deprive all the officers and agents of a corporation of authority to act can be effective, for if so, it must terminate, or suspend the exercise of, functions committed to the corporation by law, and which it is not given power to abdicate: *Long Island Ins. Co. v. Great Western Mfg. Co.*, 2 Kan. App. 377, 42 Pac. 738; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; *St. Paul Fire & Marine Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240; *Burnham v. Greenwich Fire Ins. Co.*, 63 Mo. App. 85. This question is best discussed in *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222. The policy there in question contained a stipulation that no officer, agent, or other representative of the company, should be held to have waived any of the terms and conditions of the policy, unless such waiver should be indorsed thereon in writing. Considering and determining the effect of this stipulation, the court said: "It is an important consideration that this policy does not impose any restriction upon the power of any particular agent, or class of agents; nor does it limit the power of some agents by conferring authority exclusively upon others; nor does it prescribe the manner in which alone a particular agent or class of agents shall exercise their authority. We do not, therefore, express any opinion concerning the effect of such stipulations. The restriction here is so broad that it applies alike to every 'officer, agent, or representative of this company'; and, as a corporation can only act through such agencies, the substance of the provision under consideration is that

the company shall not be held to have waived any of the terms or conditions of the policy, unless its waiver be expressed by a written indorsement on the policy. That is to say, in other words, that one of the parties to a written contract, which is not required by law to be in writing, cannot, subsequent to the making of the contract, waive by parol agreement, provisions which had been incorporated in the contract for his benefit. A contracting party cannot so tie his own hands, so restrict his own legal capacity for future action, that he has not the power, even with the assent of the other party, to bind or obligate himself by his future action or agreement contrary to the terms of the written contract. This is self-evident. The clause of this policy relied upon as expressly restricting the power of the agent whose conduct is here in question, is of that character. If it is effectual at all as a limitation of the power of future action, it limits the power of every agent, officer, and representative of the company, and hence, practically, that of the corporation. It is no more applicable to this particular agent than to all of those to whom the conduct of the affairs of the corporation is committed. In that broad scope, and as applicable to all the representatives of the corporation, it cannot be enforced so as to render inoperative such subsequent action or agreement of corporate agents as would, if it were not for this clause in the contract, be deemed the effectual action or agreement of the corporation. A more restricted application of this clause, making it to refer to this particular agent, or to any particular class of agents or officers, cannot be made; nor can the clause in the former part of the above extract from the policy, as to the effect of vacancy 'without notice to the company and consent indorsed hereon,' be construed as a limitation upon the power of any particular agent or class of agents. If it applies to any agent or officer, it does to all; and if such a stipulation is not effectual to limit the legal capacity of the corporation as to its future action, it does not limit its capacity to act by its agents. The company, then, was legally capable, acting through its proper agents, of waiving its right to treat the policy as of no further binding force by reason of the vacancy; and it could also waive compliance with that part of the same provision which related to the consent being indorsed on the policy."

In full accord with the decision just quoted are the courts of Wisconsin, which perhaps go somewhat farther, and maintain that it is not within the power of an insuring corporation to deny, at least to its general agents, the power to act for it, nor to escape the result of such action by any prohibition contained in the policy, however general and comprehensive. Thus, in *Renier v. Dwelling-House Ins. Co.*, 74 Wis. 89, 42 N. W. 208, the question presented was whether a general agent, with knowledge of encumbrances, had, by recognizing the policy as a subsisting contract, waived the forfeiture previously incurred thereby. On the part of the insurer it was in-

sisted that liability did not exist, because it provided only for waivers or extensions "in express terms and in writing signed by the president and secretary of the company." The court said: "But the clause in the policy referred to is claimed to be broad enough to include the general agent, and in fact every officer and agent of the company, except the president and secretary, and even them, unless the act be in express terms and in writing, signed by one of them. We must hold, however, that such attempted restrictions upon the power of the company, or its general officers or agents, acting within the scope of their general authority, to subsequently modify the contract and bind the company in a manner contrary to such previous conditions in the policy, are ineffectual. Especially is this true in respect to a foreign insurance company, whose officers are practically inaccessible to the assured." This decision was followed and approved in the later case of *Bick v. Equitable Fire etc. Ins. Co.*, 92 Wis. 46, 65 N. W. 742, where the existence of foreclosure proceedings was relied upon as avoiding the policy, but the assured insisted that the insurer had waived the forfeiture. Such waiver, if it existed, resulted from the knowledge and acts of an agent of the insurer, whereas the policy provided that no officer, agent, or other representative of the company should have power to waive any provision or condition, except such as, by the terms of the policy, might be subject to agreement indorsed thereon or added thereto, and as to such provisions and conditions, no officer or agent should have power or be deemed to have waived them, unless such waiver should be written upon or attached to the policy.

b. **Waivers Contrary to the Terms of Policy.**—Every condition and stipulation may be waived by the insurer, in any mode in which it chooses to act, and regardless of the terms of the policy. All stipulations and conditions in a policy that the insurer or its agents will not waive any condition or forfeiture, or that it will act in a certain manner only, or by designated agents only, as already suggested, cannot diminish the authority of the insurer to do as, by its agents, it may deem best, in every contingency which may subsequently arise. A stipulation or condition of the class here under consideration is doubtless in so far valid as to impute notice to the assured of the restrictions contained in his policy, both with respect to the authority of agents and the manner in which it must be exercised. A corporation may, the same as a natural person, at any time, change its views and mode of action, and may conclude to give to its agents authority which was withheld when the policy was issued, or to permit them to act orally when the policy requires that their action must be in writing indorsed thereon. Nor need this change of views, or further delegation of authority, be manifested by resolution of the board of directors, or any other written evidence. Before the condition was imposed, the corporation was at liberty to select agents by parol and to fix the limits of their authority, and, without any ex-

press fixing, either parol or written, such authority might have been conferred or fixed by custom, by a course of dealing either actually known to the corporation or of a character of which it could not remain ignorant and assert its ignorance as a shield, without being guilty of fraud upon persons dealing with it. The fact that a waiver was forbidden in the policy, or if not there forbidden, was there provided to be done in a designated manner or by a designated agent only, while it is material, and in the absence of other evidence, controlling, is by no means final. The ultimate question, no matter what the policy says, is, Did the insurer waive the condition, so that it must be held estopped from denying such waiver? If so, the waiver is as effective as if it fell within the express terms of the policy and had been accomplished by the act and in the manner therein provided for: *Alabama State Mut. Assur. Co. v. Long C. & S. Co.*, 123 Ala. 667, 26 South. 655; *United States Life Ins. Co. v. Lesser*, 126 Ala. 568, 28 South. 646; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 54 Am. St. Rep. 297, 35 S. W. 428; *Bouton v. American Mut. Life Ins. Co.*, 25 Conn. 542; *Tillis v. Liverpool etc. Ins. Co.*, 46 Fla. 268, 35 South. 171; *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 135, 2 Am. Rep. 567; *Western Assur. Co. v. Williams*, 94 Ga. 128, 21 S. E. 370; *Pennsylvania Mut. Life Ins. Co. v. Keach*, 32 Ill. App. 427, 134 Ill. 583, 26 N. E. 106; *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990; *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314; *Orient Ins. Co. v. McKnight*, 96 Ill. App. 525, 197 Ill. 190, 64 N. E. 339; *Metropolitan Life Ins. Co. v. Sullivan*, 112 Ill. App. 500; *Citizens' Ins. Co. v. Stoddard*, 99 Ill. App. 469, 197 Ill. 330, 64 N. E. 355; *Excelsior Mut. Aid Assn. v. Riddle*, 91 Ind. 84; *Hanover Fire Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 772; *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507, 96 Am. Dec. 65; *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *King v. Council Bluffs Ins. Co.*, 72 Iowa, 310, 33 N. W. 690; *Siltz v. Hawkeye Ins. Co.*, 71 Iowa, 710, 29 N. W. 605; *Lutz v. Anchor Fire Ins. Co.*, 120 Iowa, 136, 98 Am. St. Rep. 349, 94 N. W. 274; *Glasscock v. Des Moines Ins. Co.*, 125 Iowa, 170, 100 N. W. 503; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *German Ins. Co. v. Gray*, 43 Kan. 497, 19 Am. St. Rep. 150, 23 Pac. 637, 8 L. R. A. 70; *German Ins. Co. v. Allen*, 69 Kan. 729, 77 Pac. 529; *German-American Ins. Co. v. Yellow Poplar Lumber Co.*, 27 Ky. Law Rep. 105, 84 S. W. 551; *Aetna Life Ins. Co. v. Hartley*, 24 Ky. Law Rep. 57, 67 S. W. 19, 68 S. W. 1081; *Hale v. Mechanics' Mut. Fire Ins. Co.*, 6 Gray, 169, 66 Am. Dec. 410; *Kotwicki v. Thuringia Ins. Co.*, 134 Mich. 81, 95 N. W. 976; *St. Paul Fire etc. Ins. Co. v. Parsons*, 47 Minn. 352, 59 N. W. 240; *Liverpool etc. Ins. Co. v. Sheffy*, 71 Miss. 919, 16 South. 307; *Burdick v. Security Life Assn.*, 77 Mo. App. 629; *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21, 59 N. W. 752; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb. 495, 25 N. W. 620; *Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 779; *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195; *Dilleber v. Knickerbocker Life Ins.*

Co., 76 N. Y. 567; *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315, 42 Am. Rep. 297; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *Schmur v. State Ins. Co.*, 30 Or. 19, 46 Pac. 363; *Coursin v. Pennsylvania Ins. Co.*, 46 Pa. St. 323; *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 700, 29 S. E. 245; *Equitable Life Assur. Soc. v. Cole*, 13 Tex. Civ. App. 486, 35 S. W. 720; *Georgia Home Ins. Co. v. Kinner's Admx.*, 28 Gratt. 88; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523, 84 Am. Dec. 714; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361, 10 N. W. 381; *Dick v. Equitable Fire etc. Co.*, 92 Wis. 46, 65 N. W. 742; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059; *Mutual etc. Assn. v. Cleveland W. Mills*, 82 Fed. 508, 27 C. C. A. 212; *Aetna Life Ins. Co. v. Frierson*, 114 Fed. 56, 51 C. C. A. 424; *Knickerbocker Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Phoenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 34, 1 Sup. Ct. Rep. 18, 27 L. ed. 65.

c. Imputing to Insurers Knowledge Possessed by Their Agents.—

The general rule of law imputing to a principal notice given to or possessed by his agent applies to insurers not less than to other principals. While principals in this business have taken greater pains than those in any other to exempt themselves from the operation of this rule, they have been generally, if not universally, unsuccessful. Policies usually contain many conditions and restrictions inserted for the purpose of relieving the insurer from liability for all acts done by, and all notices given to, and all knowledge acquired by, their agents. Nevertheless, irrespective of the stipulations contained in a policy, if it can be said that in doing any act, one was in fact the agent of the insurer and acting as such, his principal, though without the actual knowledge possessed by the agent, must be deemed to have acted with such knowledge, and held to be bound or estopped to the same extent as if the agent had actually imparted to his principal knowledge of all the material facts known to him when acting for his principal: *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 South. 379; *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 South. 48; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *St. Paul Fire etc. Ins. Co. v. Wells*, 89 Ill. 82; *Globe Mut. Life Ins. Assn. v. Ahern*, 92 Ill. App. 326, 191 Ill. 167, 60 N. E. 806; *Northwestern M. Aid Assn. v. Bodurtha*, 23 Ind. App. 121, 77 Am. St. Rep. 414, 53 N. E. 787; *Keenan v. Missouri State Mut. Ins. Co.*, 12 Iowa, 126; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *Jordan v. State Ins. Co.*, 64 Iowa, 216, 19 N. W. 917; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308, 21 N. W. 652; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47; *Reynolds v. Iowa & Nebraska Ins. Co.*, 80 Iowa, 563, 46 N. W. 659; *Frane v. Burlington Ins. Co.*, 87 Iowa, 288, 54 N. W. 237; *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. 261; *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586; *Germania Ins. Co. v. Wingfield*, 22 Ky. Law Rep. 455, 57 S. W. 456; *Rogers v. Farmers' Mut. Aid Assn.*, 20 Ky. Law

Rep. 1925, 50 S. W. 543; *Gristock v. Royal Ins. Co.*, 84 Mich. 161, 27 N. W. 549; 87 Mich. 428, 49 N. W. 634; *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514, 32 Am. St. Rep. 519, 53 N. W. 818, 18 L. R. A. 481; *Michigan Shingle Co. v. State Inv. & Ins. Co.*, 94 Mich. 389, 53 N. W. 945, 22 L. R. A. 314; *Rivara v. Queen Ins. Co.*, 62 Miss. 720; *Mitchell v. Missouri Home Ins. Co.*, 72 Miss. 53, 48 Am. St. Rep. 535, 18 South. 46; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 South. 13; *Liverpool etc. Ins. Co. v. Farnsworth Lumber Co.*, 72 Miss. 555, 17 South. 445; *City of De Soto v. American G. F. Ins. Co.*, 102 Mo. App. 1, 74 S. W. 1; *Eagle Fire Co. v. Glove Loan & Trust Co.*, 44 Neb. 380, 62 N. W. 895; *Campbell v. Merchants' etc. M. F. Ins. Co.*, 37 N. H. 35, 72 Am. Dec. 324; *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 273; *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; *Horton v. Home Ins. Co.*, 122 N. C. 498, 65 Am. St. Rep. 717, 29 S. E. 944; *Gerringer v. North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. 773; *Burson v. Fire Assn.*, 136 Pa. St. 267, 20 Am. St. Rep. 919, 20 Atl. 401; *Madden v. Phoenix Ins. Co.*, 70 S. C. 295, 49 S. E. 855; *Sun Life Ins. Co. v. Phillips* (Tex. Civ. App.), 70 S. W. 603; *Continental Fire Assn. v. Norris*, 30 Tex. Civ. App. 299, 70 S. W. 769; *Lynchburgh Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177; *Virginia Fire etc. Co. v. Goode*, 95 Va. 762, 30 S. E. 370; *Gans v. St. Paul Fire etc. Ins. Co.*, 43 Wis. 108, 23 Am. Rep. 535; *Dick v. Equitable Fire etc. Co.*, 92 Wis. 46, 65 N. W. 742; *McDonald v. Fire Assn.*, 93 Wis. 348, 67 N. W. 719; *Welch v. Fire Assn.*, 120 Wis. 456, 98 N. W. 227; *Queen Ins. Co. v. Union Bank etc. Co.*, 111 Fed. 697, 49 C. C. A. 555. The rule is subject to the same limitations as in other cases where the relation of principal and agent exists, the chief of which are: that the principal is not chargeable with the acts of the agent outside the scope of his employment: *Cornelious v. Farmers' Ins. Co.*, 113 Iowa, 183, 84 N. W. 1087; nor with notice given to or knowledge acquired by the agent when not acting for his principal, unless, when so acting, such knowledge was actually present in the mind of the agent: *St. Paul Fire etc. Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240; *Sun Mutual Ins. Co. v. Texarkana Fire etc. Co.*, 15 S. W. 34, 4 Wills. C. A. Ct., sec. 31; *Queen Ins. Co. v. May* (Tex. Civ. App.), 35 S. W. 829; *McDonald v. Fire Assn.*, 93 Wis. 348, 67 N. W. 719; *Union Nat. Bank v. German Ins. Co.*, 71 Fed. 473, 18 C. C. A. 203. Generally, an insurer is not chargeable with a fact because his agent might have acquired knowledge thereof had he acted with reasonable diligence: *Sanders v. Cooper*, 115 N. Y. 279, 12 Am. St. Rep. 801, 22 N. E. 212, 5 L. R. A. 638. This rule must, however, be subject to some exceptions. It cannot be extended so as to permit the principal agents of the insurer to pursue a course of conduct toward the insured which will lead him to believe, and act upon the assumption, that he is protected and that no forfeiture has been incurred, when ordinary attention to the affairs intrusted to them must reveal to such agents that the contrary is the case. Hence, if an insurer sends

its agents to make collections of premiums from a policy-holder after installments which have been in default have been paid up, the waiver of forfeiture which should be deemed to result cannot be avoided on the ground that the officers of the company were not cognizant of the cause of forfeiture, if, had they been ordinarily attentive to their duties, they must have been correctly informed of all the facts: *Tobin v. West Mut. Aid Soc.*, 72 Iowa, 261, 33 N. W. 663; *Baltimore Life Ins. Co. v. Howard*, 95 Md. 244, 52 Atl. 397.

d. **Constructive Notice to Insurers.**—The statutes providing for the registration in some public office of instruments affecting the title to real property usually, if not universally, provide that such registration shall impute notice of the contents of the writing so registered to subsequent purchasers and encumbrancers. Insurers are neither, and hence are not, when issuing policies, chargeable with notice of such registered instruments, and may therefore seek and find protection in conditions in such policies exempting insurers from liability in case the condition of the title to the property insured has not been truly disclosed, or encumbrances existed which have not been noted on the policy, though the condition of such title, or the existence of such encumbrances, appears on the public records, and must have been disclosed had any examination been made thereof: *Orient Ins. Co. v. Williamson*, 98 Ga. 464, 25 S. E. 560; *Shaffer v. Milwaukee Mut. Ins. Co.*, 17 Ind. App. 204, 46 N. E. 557; *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516, 52 N. E. 771; *Milwaukee M. Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757; *Wicke v. Iowa State Ins. Co.*, 90 Iowa, 4, 57 N. W. 632; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 73 Am. Dec. 673; *Aetna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. 915; *United States Ins. Co. v. Moriarity* (Tex. Civ. App.), 36 S. W. 943.

e. **False Answer Inserted in Applications by Agents and Medical Examiners.**

1. **General Rule Obtaining.**—Perhaps the most frequent application of the rule that knowledge of an agent of the insurer is imputed to his principal arises in those cases in which applications in writing are made out by persons acting as agents for the insurer to the extent, at least, of soliciting insurance and preparing and forwarding such applications, and in which, though the applicant has truly answered all questions asked him and given such agent all information desired, he, nevertheless, whether by mistake, inadvertence, or design, suppresses information or answers given, and even writes out, and incorporates into the application, answers the very reverse of those made, and the insurer, relying on the application as written, thereafter issues a policy thereon. The policy may, and usually does, contain statements that all such answers shall be deemed material warranties, that no agent or representative of the insurer has authority to waive anything; and sometimes the further stipulation that the person writing out the application shall, in doing so, be

deemed the agent of the assured, and not of the insurer. Generally, irrespective of what the policy or application may say to the contrary, the person making out the application is deemed the agent of the insurer, unless in fact employed by the insured, and whatever knowledge was given to such agent is imputed to his principal, who is deemed to have issued the policy after acquiring such knowledge, and not on the faith of the misrepresentations in the application due to the act or mistake of the agent, and the insurer is therefore held to be estopped from relying thereon to defeat an action by the insured, unless the latter acted in complicity with the agent, or otherwise for the purpose, and with the intent, of misleading or defrauding the insurer: *Williamson v. New Orleans Ins. Assn.*, 84 Ala. 106, 4 South. 36; *Creed v. Sun Fire Office*, 101 Ala. 522, 46 Am. St. Rep. 134, 14 South. 323, 23 L. R. A. 177; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 South. 46; *Southern Ins. Co. v. Hastings*, 64 Ark. 253, 41 S. W. 1093; *Mutual R. F. Life Assn. v. Farmer*, 65 Ark. 581, 47 S. W. 850; *Menk v. Home Ins. Co.*, 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; *Parrish v. Rosebud Min. etc. Co.*, 140 Cal. 635, 74 Pac. 312; *State Ins. Co. v. Taylor*, 14 Colo. 499, 20 Am. St. Rep. 281, 24 Pac. 333; *Wich v. Equitable Fire etc. Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389; *State Ins. Co. v. DuBois*, 7 Colo. App. 214, 44 Pac. 756; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64, 34 Am. Rep. 106; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Security Trust Co. v. Tarpey*, 182 Ill. 52, 54 N. E. 1041; *Provident Sav. Life Assur. Soc. v. Cannon*, 103 Ill. App. 534, 201 Ill. 260, 66 N. E. 388; *Phoenix Ins. Co. v. Stark*, 120 Ind. 444, 22 N. E. 413; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498; *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 377, 24 Am. Rep. 784; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737, 56 Am. Rep. 870, 8 N. W. 47; *Donnelly v. Cedar Rapids Ins. Co.*, 70 Iowa, 693, 28 N. W. 607; *Dryer v. Security Fire Ins. Co. (Iowa)*, 82 N. W. 494; *Gurnett v. Atlas Mut. Ins. Co.*, 124 Iowa, 547, 100 N. W. 542; *Taylor v. Anchor etc. Ins. Co.*, 116 Iowa, 625, 93 Am. St. Rep. 261, 88 N. W. 807, 57 L. R. A. 328; *Sullivan v. Phenix Ins. Co.*, 34 Kan. 170, 8 Pac. 112; *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 7 Am. St. Rep. 557, 18 Pac. 291; *National Mut. Fire Ins. Co. v. Barnes*, 41 Kan. 161, 21 Pac. 165; *State Ins. Co. v. Gray*, 44 Kan. 731, 25 Pac. 197; *Kansas etc. Ins. Co. v. Saindon*, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15; *Standard L. & A. Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856; *Hartford Fire Ins. Co. v. Haas*, 10 Ky. Law Rep. 573, 9 S. W. 720; *Western Assur. Soc. v. Rector*, 85 Ky. 294, 3 S. W. 415; *Marston v. Kennebec Mut. Life Ins. Co.*, 89 Me. 266, 56 Am. St. Rep. 412, 36 Atl. 389; *Temminck v. Metropolitan Life Ins. Co.*, 72 Mich. 388, 40 N. W. 469; *Crouse v. Hartford Fire Ins. Co.*, 79 Mich. 249, 44 N. W. 496; *Otte v. Hartford Life Ins. Co.*, 88 Minn. 423, 97 Am. St. Rep. 532, 93 N. W. 608; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *American Life Ins. Co. v. Mahone*, 56 Miss. 180; *Lewis*

v. Mutual Reserve Fund Life Assn. (Miss.), 27 South. 649; Combs v. Hannibal Sav. & Ins. Co., 4b Mo. 148, 97 Am. Dec. 383; Phoenix Ins. Co. v. Owens, 81 Mo. App. 201; Nute v. Hartford Fire Ins. Co., 109 Mo. App. 585, 83 S. W. 83; German Ins. Co. v. Frederick, 57 Neb. 538, 77 N. W. 1106; Fidelity M. & F. Ins. Co. v. Loewe (Neb.), 93 N. W. 749; Clark v. Union Mut. Fire Ins. Co., 40 N. H. 333, 77 Am. Dec. 721; Bennett v. Agricultural Ins. Co., 106 N. Y. 243, 12 N. E. 609; O'Brien v. Home Ben. Soc., 117 N. Y. 310, 22 N. E. 954; Blass v. Agricultural Ins. Co., 162 N. Y. 639, 57 N. E. 1104; Farmers' Ins. Co. v. Williams, 39 Ohio St. 584, 48 Am. Rep. 574; Smith v. Farmers' etc. Fire Ins. Co., 89 Pa. St. 287; Kister v. Lebanon Mut. Ins. Co., 128 Pa. St. 553, 15 Am. St. Rep. 696, 18 Atl. 447, 5 L. R. A. 646; Gould v. Dwelling-House Ins. Co., 134 Pa. St. 570, 19 Am. St. Rep. 717, 19 Atl. 793; Dowling v. Merchants' Ins. Co., 168 Pa. St. 234, 31 Atl. 1087; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 S. E. 562; Graham v. Fire Ins. Co., 48 S. C. 195, 59 Am. St. Rep. 707, 26 S. E. 323; South Bend i. M. Co. v. Dakota Fire etc. Ins. Co., 2 S. Dak. 17, 48 N. W. 310; Home Ins. Co. v. Hancock, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665; Continental Fire Ins. Co. v. Whitaker, 112 Tenn. 151, 105 Am. St. Rep. 916, 79 S. W. 119, 64 L. R. A. 951; Home Ins. Banking Co. v. Lewis, 48 Tex. 622; Mutual Fire Ins. Co. v. Ward, 95 Va. 231, 28 S. E. 209; Farmers' etc. Ins. Co. v. Williams, 95 Va. 248, 28 S. E. 214; Mullin v. Vermont Mut. Fire Ins. Co., 58 Vt. 113, 4 Atl. 817; McCall v. Phoenix Mut. Life Ins. Co., 9 W. Va. 237, 27 Am. Rep. 558; Schwarzbach v. Ohio Valley P. M., 25 W. Va. 622, 52 Am. Rep. 251; Dietz v. Providence-Washington Ins. Co., 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50; Coles v. Jefferson Ins. Co., 41 W. Va. 261, 23 S. E. 732; May v. Buckeye Mut. Ins. Co., 25 Wis. 291, 3 Am. Rep. 76; Mechler v. Phoenix Ins. Co., 38 Wis. 665; Dunbar v. Phenix Ins. Co., 72 Wis. 492, 40 N. W. 386; Standard Life etc. Ins. Co. v. Fraser, 76 Fed. 705, 22 C. C. A. 499; New York Life Ins. Co. v. Russell, 77 Fed. 94, 23 C. C. A. 43; Phoenix Ins. Co. v. Wartenberg, 79 Fed. 245, 24 C. C. A. 547.

The principle just stated applies equally to medical examiners appointed by life insurance companies, though the application or policy may declare that such is not the case; for examiners are in law agents of the corporation selecting them and requiring the performance of their duties, including the asking of questions and the writing in the application of the responses thereto. Hence, though a medical examiner omits an answer made by the applicant, or writes it out substantially different from the response actually given by him, and the insurer acts only on the answers so written, still, as in law the medical examiner is the agent of the insurer, and not of the assured, the former cannot escape liability on account of the failure of its medical examiner to perform his duty, nor even on account of his intentional misperformance of it. He is the agent of the insurer, and to it his knowledge is imputed, and if it issues

its policy, it must be deemed to have done so after its agent had communicated to it all the facts made known to him, and it is estopped from contending to the contrary: *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 528, 25 S. W. 835; *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102; *Mystic Workers v. Troutman*, 113 Ill. App. 84; *Royal Neighbors v. Boman*, 177 Ill. 27, 69 Am. St. Rep. 201, 52 N. E. 264; *Arnhorst v. National Union*, 179 Ill. 486, 53 N. E. 988; *Sternaman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13, 62 N. W. 763, 57 L. R. A. 318; *Flynn v. Equitable Life Assur. Soc.*, 15 Hun, 521, 78 N. Y. 568, 34 Am. Rep. 561; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 16 Am. St. Rep. 893, 12 S. W. 621, 7 L. R. A. 217. The insurer is not, however, bound by facts communicated or otherwise known to the medical examiner, but respecting which he has no duty to perform. Thus, in *Leonard v. State Mut. Life Assur. Co.*, 24 R. I. 7, 96 Am. St. Rep. 698, 51 Atl. 1049, the defense to the action was based upon the claim that statements made to the medical examiner relating to the death of sisters of the applicant were untrue, and further, that the applicant had made a false statement respecting whether he contemplated obtaining other insurance on his life. On the part of the plaintiff it was contended, and evidence was offered to prove, that, in response to the questions of the medical examiner, the applicant had truly stated the cause of the death of his sisters, and his statement had not been correctly written out by such examiner, and in respect to a question asked by a soliciting agent relating to the amount of other insurance, the applicant had asked the medical examiner if it would "make any difference," and the latter had answered, "No." Considering these two propositions, the court said, that as the insurer required the medical examiner to put the questions and fill out the answers in his own handwriting, it thereby made him the agent of the company, and that if he received correct answers and took the signature of the applicant before the answers were recorded, all this must be regarded as the action of the insurer, but with respect to the inquiry made of such examiner and his reply thereto, he was not the agent of the company, for the reason that his duties were confined to the medical certificate, and notice to him of anything not called for by the certificate was not notice to the insurer. It will be observed, however, that both in this case and in that of *Leonard v. New England Mut. Life Ins. Co.*, 22 R. I. 519, 48 Atl. 808, the court seemed to place emphasis on the fact that the signature of the applicant was taken before his answers were recorded, and hence these decisions are not necessarily controlling where, as is usually the case, the application was signed after the medical examiner had fully entered the answers therein.

The principle that the knowledge of an agent must be imputed to his principal is entirely inapplicable when the agent and the ap-

plicant for insurance join in an attempt to deceive the insurer and thus fraudulently procure insurance. An agent thus acting is not only stepping outside the limits of his authority, but is further known to the applicant to be doing so. Furthermore, both are assisting in a conscious fraud upon the insurer, who, because of such fraud, is released from his contract entered into in ignorance of it: *Ryan v. World Life Mut. Ins. Co.*, 41 Conn. 168, 19 Am. Rep. 490; *Sprinkle v. Knight Templar etc. Indemnity Co.*, 124 N. C. 405, 32 S. E. 734. Nor is it necessary to show by any direct evidence that there was collusion on the part of the applicant and the agent. Thus, if an applicant falsely answers a question, and such falsity being known to the agent, he nevertheless writes out the answer and forwards the application to the insurer, who issues a policy thereon, it will be presumed that there was collusion between the applicant and the agent, and no recovery can be had on the policy, if issued, when the insurer had no notice of the falsity of such answer: *Triple Link Mut. Indemnity Assn. v. Williams*, 121 Ala. 138, 77 Am. St. Rep. 34, 26 South. 19.

2. **Apparent Departure and Dissent from the General Rule.**—Numerous as are the decisions cited in the preceding subdivision—and they might without difficulty be greatly increased—there has long been some dissent therefrom, which has more recently been rendered extremely formidable, as we shall hereafter show, by the concurrence of the supreme court of the United States. In *Kibbe v. Hamilton Mut. Ins. Co.*, 11 Gray, 163, the application for insurance had been made out by an agent of the insurer who, in so doing, purported to act as agent of the applicant. It represented the building insured as belonging to him, and failed to state that it stood on land of which he was a tenant at will only. The condition of the title was well known to the agent. The application was never seen by the assured prior to the loss of his property. The by-laws of the insurer, however, provided that any policy issued by it should be void unless the true title and interest of the assured was expressed in the application; that property standing on land held by lease should not be insured, unless specially described as such in the application, and that no insurance agent or broker forwarding an application was authorized to bind the company; and the application declared that the company should not be bound by any act done, or statement made, to or by any agent or others, not contained in the application. Upon these facts, it was found that the assured was bound by the by-laws of the insurer, and having accepted the policy, the insured adopted the representations contained in the application as if made by himself personally, and hence could not recover. *Ryan v. World Life Mut. Ins. Co.*, 41 Conn. 168, 19 Am. Rep. 490, may well be regarded as supporting the same line of decision, though the judgment of the court was doubtless influenced by the thought that there may have been guilty knowledge on the part of the beneficiary of

the insurance in the fraud which was attempted to be perpetrated on the insurer. Answering the questions contained in an application for life insurance, the applicant truly stated facts which showed him not to be a proper subject for insurance, and which must have resulted in his rejection, had his answers been truly reported by the agent. At the trial, the plaintiff, who was the widow of the assured, offered to prove, not that his answers contained in his application were true, "but that different answers were in fact given both by herself and her husband, and that the answers were wrongly written out by the local agent, without the knowledge or consent of the plaintiff or her husband." The supreme court of errors said that, "aside from the claim that the defendants are responsible for the conduct of their local agent, this is merely an attempt to substitute for a part of the written contract declared on, a different parol contract; for the representations and warranties of the plaintiff contained in their written agreement, oral representations and warranties of an entirely different character. It requires no argument to show that this cannot be done." Furthermore, the court held that the insurer could not be deemed to have intrusted its agent with power to perpetrate a fraud on it, and that to hold the principal responsible for his acts and assist in the consummation of a fraud would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for third persons and against his principal, there is no agency in respect to that transaction, at least between the agent himself and the person for whom he is really acting and the principal. The final conclusion reached was: "We are constrained, therefore, to hold that a limited agency in the case of life insurance will not be extended by operation of law to an act done by the agent in fraud of his principal, and for the benefit of the insured, especially where it is in the power of the insured by the use of reasonable diligence to defeat the fraudulent intent." At a still earlier date, namely, in 1852, *Loehner v. Howe Mut. Ins. Co.*, 17 Mo. 247, was presented to, and determined by, the supreme court of Missouri. The charter of the defendant insurance company provided that if the assured should fail to state in his application, which was made a part of the policy, any encumbrance which might exist on the insured premises, it should be void; and a memorandum was indorsed on the policy to the effect that the company would not be bound by any statement made to an agent not contained in the application. The defense to an action on the policy was that there was a deed of trust on the property at the time of the application, which was not stated therein. At the trial, evidence offered on behalf of the plaintiff, to the effect that the deed of trust was made known to the agent at the time the application was made, in response to the interrogatory therein on that subject, and that he refused to write it down, stating that the amount was too trifling, was excluded. The judgment was reversed on other grounds, but this ruling of the trial court was ap-

proved by the appellate court, which on this subject said: "The plaintiffs were not at liberty to obviate this objection, by showing that the agent of the company was informed of the existence of an encumbrance at the time of the application, but that he refused to write down the answer, saying the encumbrance was too trifling. Independently of the statute, which required the encumbrance to be expressed in the policy at the peril of its being void, there was a memorandum indorsed on it, which made known that the company would be bound by no statement made to the agent not contained in the application. The facts being as represented, they could not give the plaintiffs a right of action on the policy in the teeth of the statute, and against the terms of the contract. If the conduct of the agent was such as is alleged, he was guilty of a gross fraud, as is shown by his setting up this defense, which would avoid the policy and give a right of action for the recovery of the premium, but could not, for the reasons given, entitle the plaintiffs to an action on the policy."

Thus the question stood when *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, 29 L. ed. 934, was presented to the supreme court of the United States. The defense was that the answers made by an applicant for life insurance were untrue. This defense was met by the reply, on the part of the plaintiff, that the agent of the defendant, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading, and were by the agent transmitted to the insurer. A demurrer to this reply was overruled. The policy recited that it was issued in consideration and upon the faith of statements and representations contained in the application, all of which were warranted to be true. A copy of the application was annexed to the policy, and upon it was conspicuously indorsed, in red type, a notice purporting to be for the information of the assured, and stating that in order that any unintentional errors or omissions which might thereafter be found to exist, might be corrected, an abstract of the application upon which the policy was issued might be found upon the third page within, and that if corrections were desired, when satisfactory to the company, a certificate to that effect would be issued over the signature of the president and actuary. The court intimated that if, as alleged by the plaintiff, both the insured and the assured were deceived by the acts of the former's agent in incorrectly writing out the answers made in the application, "it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in

order to secure a valuable contract which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is not for such a cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid." Proceeding, the court added, that it was the duty of the applicant to read the application; that he knew upon it the policy would be issued, if issued at all; that "it would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed." Further it was said: "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided. The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid, it would have been his duty to decline to go

any further with the transaction; but if he did not discover the fraud until after such delivery and payment, he was not called upon to take any steps for the cancellation of the contract. In other words, the jury were told that the assured might take to himself the benefit of the fraud without responsibility for it, if he did not discover it until after it was consummated—a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctioning it.”

The opinion from which we have just quoted warrants us in affirming that, in the national courts, if a policy of insurance is based on false answers written in the application for the insurance by the agent of the insurer, there can in no case be a recovery by the assured, for the reason that the policy is in effect the result of the fraud of the agent, which the insurer can neither be deemed to have authorized nor ratified, and more especially is this true when the language in the policy or in the application, the substance of which is either indorsed on it or made a part of the policy, if read by the assured, must give him notice of the limitations upon the agent’s authority and that the policy is issued on representations contained in the application, which representations, if the assured reads his policy, he must know to be untrue. Though two decades have passed since this decision was published, the state courts have been but infrequently required, in express terms, to either approve or dissent from it. As to the first proposition, we have met with no other decision affirming it, unless it be that of *Ward v. Metropolitan Life Ins. Co.*, 66 Conn. 227, 50 Am. St. Rep. 80, 33 Atl. 902. As to the second proposition, there is a somewhat limited approval of some of the state courts in which, however, their judgment can also be further supported by the consideration, that, in the cases before them, the assured could not have received and retained the policy in question in ignorance of the misconduct of the insurer’s agent without being guilty of fraud or gross negligence: *Murphy v. Royal Ins. Co.*, 52 La. Ann. 775, 27 South. 143; *Johnson v. Dakota Fire etc. Ins. Co.*, 1 N. Dak. 167, 45 N. W. 799. In the subordinate national courts the views of the supreme court must be accepted without question, and they have been applied to misrepresentations due to medical examiners in taking applications for life insurance: *Caruthers v. Kansas M. L. Ins. Co.*, 108 Fed. 487.

f. **Restrictions, to What Conditions Applicable.**—Restrictions found in policies of insurance respecting the power of agents to waive forfeitures for breaches of condition therein must, unless the language used necessarily forbids, be construed or interpreted as applying only to the time intervening between the issuing of the policy and the occurrence of a loss thereunder. Hence, notwithstanding a general restriction upon his authority to waive conditions or a requirement that his waiver shall be only in writing signed or indorsed in some

specified manner, such restriction or requirement will be held not to apply to waivers after the occurrence of a loss: *Wheaton v. North British etc. Co.*, 76 Cal. 415, 8 Am. St. Rep. 216, 18 Pac. 758; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. Rep. 323; *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499, 38 Atl. 29; *Blake v. Exchange M. Ins. Co.*, 12 Gray, 265; *New Orleans Ins. Assn. v. Matthews*, 65 Miss. 301, 4 South. 62; *Loeb v. American C. Ins. Co.*, 99 Mo. 50, 12 S. W. 374; *Titsworth v. American Cent. Ins. Co.*, 62 Mo. App. 310; *Travelers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553. An insurer is never presumed to intend to issue a policy and receive premium therefor when, for some reason, it must be declared void at its inception, or if it can be presumed or proved to have had such an intent, it must be held estopped from realizing it. All restrictions and conditions must be construed with reference to this rule, and hence they will not be applied to alleged causes of forfeiture, which, if they existed, were already in being and known to the agent when the policy issued: *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, ante, p. 92, 51 S. E. 339; *Crouse v. Hartford Fire Ins. Co.*, 79 Mich. 249, 44 N. W. 496; *Rickey v. German Guaranty T. F. M. Ins. Co.*, 79 Mo. App. 485; *Wood v. American Fire Ins. Co.*, 78 Hun, 109, 29 N. Y. Supp. 250, 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; *State Ins. Co. v. Hale (Neb.)*, 95 N. W. 473.

II. What Agents May Waive, and the Limitations Which May be Imposed on Their Authority.

a. General Agents.

1. **Powers of.**—We have heretofore shown that as an insurance corporation cannot deprive itself of power to act by agents, a stipulation or condition that it will not waive a forfeiture, or that no agent shall do so for it, or, at least, shall not do so unless he act in a particular manner, may itself be waived: Subd. I, a, 3. The only question, no matter what the policy may say to the contrary, is, Did the agent who undertook to waive, or whether he directly undertook to waive or not, so conducted himself and the business of his principal that he must be deemed to have intended to waive, have authority to do so: *American-German etc. Ins. Co. v. Fordyce*, 62 Ark. 562, 54 Am. St. Rep. 305, 36 S. W. 1051; *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91, 1 Am. St. Rep. 42, 13 Pac. 156; *Knarston v. Manhattan Life Ins. Co.*, 124 Cal. 74, 56 Pac. 773; *Germania Life Ins. Co. v. Koehler*, 63 Ill. App. 188; *Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1; *Concordia Fire Ins. Co. v. Johnson*, 4 Kan. App. 7, 45 Pac. 722; *German Ins. Co. v. Gray*, 43 Kan. 497, 19 Am. St. Rep. 150, 23 Pac. 637, 8 L. R. A. 70; *Capitol Ins. Co. v. Bank of Pleasanton*, 50 Kan. 449, 31 Pac. 1069; *Mudd v. German Ins. Co. (Ky.)*, 56 S. W. 977; *Hartford Fire Ins. Co. v. Haas*, 10 Ky. Law Rep. 573, 9 S. W. 720; *Hartford L. etc. Ins. Co. v. Hayden's Admr.*, 90 Ky. 39, 13 S. W. 585; *Schaeffer v. Farmers' Mut. Fire Ins. Co.*, 80 Md. 563, 45 Am. St.

Rep. 351, 31 Atl. 317; Springfield Steam Laundry Co. v. Traders' Ins. Co., 151 Mo. 90, 74 Am. St. Rep. 521, 52 S. W. 238; Joy v. Pennsylvania Ins. Co., 35 Mo. App. 165; Wood v. Poughkeepsie Mut. Ins. Co., 32 N. Y. 619; Pitney v. Glens Falls Ins. Co., 65 N. Y. 6; Marcus v. Lewis Mut. Life Ins. Co., 68 N. Y. 625; Wood v. American F. Ins. Co., 78 Hun, 109, 29 N. Y. Supp. 250, 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; Lewis v. Guardian F. & L. Assur. Co., 181 N. Y. 382, 106 Am. St. Rep. 577, 74 N. E. 224; Pechner v. Phoenix Ins. Co., 6 Lans. 411; Dean v. Aetna Life Ins. Co., 2 Hun, 358, 4 Thomp. & C. 497; Van Allen v. Farmers' J. S. Ins. Co., 4 Hun, 413; Peck v. Washington Life Ins. Co., 87 N. Y. Supp. 210, 91 App. Div. 597; Gwaltney v. Provident Sav. Life Assur. Soc., 132 N. C. 925, 44 S. E. 659; Snyder v. Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744; Aetna Life Ins. Co. v. Fallow, 110 Tenn. 720, 77 S. W. 937; Wagner v. Westchester Fire Ins. Co., 92 Tex. 549, 50 S. W. 569; Aetna Ins. Co.

2. Who are.—The classification of insurance agents as general and local, as ordinarily employed, is meaningless, if not positively misleading; for when, as commonly happens, it is said that a general agent may, and a local agent may not, waive the conditions of policy and forfeitures incurred thereunder, the inference is naturally drawn that the authority to make the waiver is dependent on the extent of the territory over which the powers of the agent are or may be exercised, and that where such territory is restricted to some specified locality, the authority to waive must be denied, and when it extends over larger area, it may generally be affirmed. But one who is usually, and properly, styled a local agent, may have implied power to waive conditions and forfeitures with respect to the business committed to him, and another, who is commonly, as well as in the instrument conferring his authority, called a general agent, may be absolutely denied the power to waive any condition whatever, or restricted in his mode of action to some method pointed out in the policy. Certain officers of high rank in insurance corporations, such as the president, vice-president, secretary (Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473, 34 N. E. 289), assistant secretary, superintendent, and general manager (Bankers' etc. M. B. Assn. v. Stapp, 77 Tex. 517, 19 Am. St. Rep. 772, 14 S. W. 168), are commonly spoken of as general agents, and perhaps each of them may ordinarily be presumed to be such, and not to be included in any general restriction upon the power of agents to waive conditions (Piedmont etc. Life Ins. Co. v. McLean, 31 Gratt. 517), but this is somewhat doubtful, for it has been held in at least one case that where power to consent to an act was in terms denied in the policy to all agents, unless the consent was indorsed in writing, that no presumption could exist that the secretary was not included in the prohibition: O'Leary v. Merchants' etc. Mut. Ins. Co., 100 Iowa, 173, 62 Am. St. Rep. 555, 69 N. W. 420. Hence, we assume that the question whether one is a

general agent, and hence competent to act for the corporation to the extent of waiving forfeitures and conditions, can rarely or never be determined by considering the title of his office. At least in most cases further inquiry must be necessary to ascertain the powers actually committed to him by express delegation, or custom, or the scope of the business intrusted to him, and the manner and extent of his action when known to the corporation or so long continued or notorious that it cannot be permitted to remain in ignorance of them.

If one, though restricted to a particular vicinity, has authority to write insurance, collect premiums, and act generally as agent of the insurer for the purpose of making insurance contracts, and has long been in the habit of orally waiving conditions in policies, to the knowledge of the company, he must so far be deemed a general agent that his oral waiver of a condition will be effective, though the policy declared that unless otherwise provided by agreement indorsed thereon or added thereto, it should be void on the happening of the condition involved in the case: *Continental Ins. Co. v. Brooks*, 131 Ala. 614, 30 South. 876. Where it was claimed that an agent had waived the forfeiture arising from the existence of an encumbrance upon the property, the court said: "There is a marked distinction between waivers of condition made before, and those made after, the issuance of a policy. But an agent who has been furnished by his principal with blank applications and with policies duly signed by its officers, and who has been authorized to take risks and issue policies by simply signing his name, to collect premiums, and to cancel policies—all without consulting his principal—would certainly be empowered to waive the condition as to encumbrance either before or after the issuance of the policy. And he could waive the forfeiture by parol, notwithstanding the limitation upon his power in this respect contained in the policy": *German Ins. Co. v. Humphrey*, 62 Ark. 348, 54 Am. St. Rep. 297, 35 S. W. 428; *State Mut. Ins. Co. v. Latourrette*, 71 Ark. 242, 100 Am. St. Rep. 63, 74 S. W. 300; *Standard Acc. Ins. Co. v. Friedenthal*, 1 Colo. App. 5, 27 Pac. 88; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514, 32 Am. St. Rep. 519, 53 N. W. 818, 18 L. R. A. 481; *Robinson v. Ohio Farmers' Ins. Co.*, 93 Mich. 533, 53 N. W. 821; *Brash v. Missouri Town Mut. Ins. Co.*, 85 Mo. App. 155; *Wagaman v. Security Mut. Life Ins. Co.*, 110 Mo. App. 616, 85 S. W. 117; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 23 Am. St. Rep. 62, 13 S. E. 236; *Elkins v. Susquehanna Mut. Fire Ins. Co.*, 113 Pa. St. 886, 6 Atl. 224; *Life Ins. Co. v. Fallow*, 110 Tenn. 720, 77 S. W. 937; *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 23 S. E. 732; *Woolpert v. Franklin Ins. Co.*, 42 W. Va. 647, 26 S. E. 521; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059. One appointed agent of an insurer with authority, "to procure applications for policies of insurance upon the lives of individuals and to collect premiums in accordance with

the rules of the company, though his appointment further declares that he shall in no case alter, modify, waive, or change the terms, rates, or conditions of any paper issued by the company," and who is also determined to be authorized to receive policies when issued, collect the premium, and deliver the policy, was held to have power to waive conditions in the policy, though it provided that no person, except the president or secretary, is authorized to make alterations, discharge contracts, or waive conditions in policies: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77; *Hancock Mut. Life Ins. Co. v. Schlink*, 175 Ill. 284, 51 N. E. 795; *Metropolitan Life Ins. Co. v. Sullivan*, 112 Ill. App. 500. In a comparatively early Kansas case, the court said: "The bulk of the fire insurance business of this state is done by eastern companies, who are represented here by agents. These agents are authorized to issue policies of insurance, and the entire consummation of the contract is intrusted to them. Blank policies, signed by the home officers of the company, to be filled up and issued, and to be binding when countersigned by the agent, are placed in their hands. It is a matter of no small moment, therefore, that the exact measure and limit of the power of these agents be understood. All the assured knows about the company is generally through the agent. All the information as to the powers of and limitations upon the agent is received from him. Practically the agent is the principal in the making of the contract. It seems to us, therefore, that the rule may be properly thus laid down: that an agent authorized to issue policies of insurance, and consummate the contract, binds his principal by any act, agreement, representation or waiver, within the ordinary scope and limits of insurance business, which is not known by the assured to be beyond the authority granted to the agent": *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *National Mut. Fire Ins. Co. v. Barnes*, 41 Kan. 161, 21 Pac. 165. In neither of these cases is any reference made to any limitation upon the authority of the agent contained either in the application or the policy. Such was not the case, however, in *State Ins. Co. v. Gray*, 44 Kan. 731, 25 Pac. 197. This was a case in which it was claimed, on behalf of the assured, that answers made by him in response to the interrogatories contained in the application had been fraudulently written out by the agent. The application, which the assured signed with his mark, declared that it was understood by him that the company would not be bound by any representation of the assured or promise by the agent not contained therein; that the above statements should be the sole basis of the contract between the company and the assured, and were made a part thereof, and that having read the application and fully understanding its contents, the assured warranted it to contain a full and true description of the conditions, situation, value, occupancy, and title of the property proposed to

be insured, and that he warranted the answers to be true, and agreed that the insurance should not be binding upon the company until accepted by them. The policy stated that it was expressly understood by the parties thereto that the application and survey made by the assured was made a part of the policy and a warranty on his part, and that the policy issued on the faith of the statement in the application and survey, as they thus appeared in writing only. The trial court admitted the evidence of the plaintiff tending to support his contention that the answers, as actually given by him to the agent, were correct, but that the latter failed to properly enter them in the application. Its action was sustained, but chiefly on the ground that the assured was old, feeble, and illiterate, and that "it ought not to be held that a person not able to read or write, by merely holding a policy in his possession which contains his application, signed with his mark, thereby approves the action of the agent or solicitor in fraudulently or improperly taking his application, and becomes, by holding such policy, a participant in the fraud committed by the agent or solicitor." After entertaining some doubts upon the subject, the courts of Missouri have taken and maintained a somewhat advanced position respecting the circumstances under which local agents must be regarded as possessing authority to bind their principal, notwithstanding its attempted restriction by provisions in applications or policies: *Nickell v. Phoenix Ins. Co.*, 144 Mo. 420, 46 S. W. 435; *James v. Mutual Reserve Fund Life Assn.*, 148 Mo. 1, 49 S. W. 178. In *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90, 74 Am. St. Rep. 521, 52 S. W. 238, a policy had become void by reason of the commencement of foreclosure proceedings, unless the condition respecting them had been waived by the insurer. By the policy it was understood, agreed, and made a part of the contract, that neither the agent who issued it, nor any other person, except its secretary in the city of Chicago, had authority to waive, modify, or strike from the policy, any of its terms and conditions, and that in the event of its becoming void by reason of noncompliance with any of its terms or conditions, that no agent should have power to waive, modify, or revive it, and that any policy so made void should remain void and of no effect, any contract by parol or otherwise, or understanding with the agent, to the contrary notwithstanding. The evidence showed that the agent had power to issue policies, that he was advised of the advertisement of the property for sale under the mortgage, and took no action toward the cancellation of the policy; that he was authorized to make contracts of insurance in the name of his principal, and to issue policies and receive premiums therefor, and was clothed with all the authority of his principal in respect thereto. "The question, therefore," said the court, "was whether under such general power he was authorized to waive a forfeiture of the policy under the re-

strictions and limitations therein contained." After admitting the conflict of authority upon the question, the court solved this question in the affirmative and expressly overruled *Jenkins v. German Ins. Co.*, 58 Mo. App. 210; *Shoup v. Dwelling-House Ins. Co.*, 51 Mo. App. 286.

The fact that a local or special agent represents a foreign insurance company, or even an insurance company situated in another state, where there is no superior or general agent within the vicinity of such local agent by whom he can be superintended or controlled, and where he is hence the only representative of the company accessible to persons seeking and effecting insurance and pursuing remedies when losses have occurred, has been given, and is entitled to, great consideration, and often justifies the courts in declaring him to be a general agent, and as such, authorized to represent the company and waive in its behalf breaches of condition, and the forfeitures otherwise resulting therefrom: *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 135, 2 Am. Rep. 567; *German-American Ins. Co. v. Yeagley*, 163 Ind. 651, 71 N. E. 897; *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Hartford etc. Ins. Co. v. Hayden's Admr.*, 90 Ky. 39, 13 S. W. 585; *Forward v. Continental Ins. Co.*, 142 N. Y. 389, 37 N. E. 615, 25 L. R. A. 637; *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617.

Upon the subject we are now considering, it must be admitted the decisions "speak a varied language," but perhaps most of them are not necessarily irreconcilable when their language is construed in connection with the particular circumstances of the case to which it was applied. Thus, it may well be that the authority possessed and exercised by a local agent up to the time of the delivery of a policy may be such as to warrant the courts in regarding him a general agent of the insurer, but that the general agency does not necessarily continue beyond such delivery. Hence it may well be held, in the absence of any evidence showing the delegation to, or the exercise by, him of further authority, that he has not power to waive breaches of condition subsequently arising, such as the obtaining of additional insurance where there is no claim that notice thereof was brought home to the insurer: *Queen Ins. Co. v. Young*, 86 Ala. 424, 11 Am. St. Rep. 51, 5 South. 116; *Central City Ins. Co. v. Oates*, 86 Ala. 558, 11 Am. St. Rep. 67, 6 South. 83; *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 South. 48; *Alabama S. M. Assur. Co. v. Long C. & S. Co.*, 123 Ala. 667, 26 South. 655; *Taylor v. State Ins. Co.*, 98 Iowa, 521, 60 Am. St. Rep. 210, 67 N. W. 577; *Healey v. Imperial Fire Ins. Co.*, 5 Nev. 268; *Heath v. Springfield Fire Ins. Co.*, 58 N. H. 414; *Tabor v. Rockingham Farmers' Mut. Fire Ins. Co.*, 69 N. H. 666, 45 Atl. 479. This principle is equally applicable to encumbrances created after the delivery of the policy: *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa,

216, 42 N. W. 654, 4 L. R. A. 538; *Martin v. Farmers' Ins. Co.*, 84 Iowa, 516, 51 N. W. 29; *Egan v. Westchester Fire Ins. Co.*, 28 Or. 289, 42 Pac. 611.

We think the point upon which it will be most difficult to reconcile the decisions respects the effect of conditions contained in the policy, or otherwise brought home to the assured, expressly limiting the authority of local agents, or containing general limitations of authority which it is obvious have been devised chiefly, if not exclusively, for the purpose of restricting the functions of those agents. We think it may fairly be said that the weight of the more recent adjudications is to the effect that not only may the insurer limit the authority of an agent, but further, that when such limitations are brought to the actual knowledge of the insured, or are made a part of the terms of the contract of insurance, then that he is bound thereby, and though the agent exercises functions which might otherwise have entitled him to be regarded as a general agent, he cannot, contrary to the terms of the contract, waive conditions or forfeitures, unless it is shown that such waiver was known to the insurer, or the powers generally exercised by the agent were such as to be inconsistent with the terms of the contract, and this fact was known to the insurer, or if not known, its ignorance was consistent only with fraud or gross inattention to its business: *Kyte v. Commercial Assur. Co.*, 144 Mass. 43, 10 N. E. 518; *Putnam Tool Co. v. Fitchburg Mut. Fire Ins. Co.*, 145 Mass. 265, 13 N. E. 902; *Porter v. United States Life Ins. Co.*, 160 Mass. 183, 35 N. E. 678; *Parker v. Rochester German Ins. Co.*, 162 Mass. 479, 39 N. E. 179; *German Ins. Co. v. Heiduk*, 30 Neb. 288, 27 Am. St. Rep. 402, 42 N. W. 481; *Hunt v. State Ins. Co.*, 66 Neb. 121, 92 N. W. 921; *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252. The supreme court of the United States in its most recent expression of its conclusions upon this subject, said: "What, then, are the principles sustained by the authorities, and applicable to the case in hand? They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their poli-

cies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy, or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent": *Northern Assur. Co. v. Grand View Bldg. Assn.*, 183 U. S. 308, 361, 22 Sup. Ct. Rep. 133, 46 L. ed. 213.

3. **Statutory Provisions.**—Under section 1205 of the code of Alabama, anyone who solicits insurance or transmits an application or a policy, or gives notice that he will transmit or receive them, or delivers a policy, or inspects a risk, or makes and forwards a diagram, or does anything in the making of an insurance contract with another, is deemed an agent of the insurer: *Noble v. Mitchell*, 100 Ala. 519, 14 South. 581, 25 L. R. A. 238. In Illinois, the statute relating to foreign insurance companies provides: "The term 'agent' or 'agents' shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this state." In considering this statute, the supreme court quoted and approved the following, which, respecting a similar statute, was announced by the supreme court of Wisconsin: "The obvious intention of the legislature is to make an insurance company responsible for the acts of a person who assumes really to represent and act for it in these particulars, and to change the rule of law that the insured must at his peril know whether the person with whom he is dealing has the power he assumes to exercise, or is acting within the scope of his authority." Under this statute it was held that one employed by an insurance agent of a foreign insurance company to assist it in its insurance business, who did general office work, kept books, conducted correspondence, collected premiums, and acted as solicitor to the knowledge of the company, was its agent, and that the condition of the policy, that "it is further understood and made a part of this contract that the agent of this company has no authority to waive, modify, or strike from this policy any of

its printed conditions," did not limit the power of an agent to make an agreement before the issuing of the policy that it should contain a condition permitting the building insured to remain vacant a specified length of time without constituting a breach of the policy: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77.

By the statute of Iowa, "any person who shall hereafter solicit insurance or procure applications therefor shall be held to be the soliciting agent of the insurance company issuing the policy, or a renewal thereof, anything in the application or policy to the contrary notwithstanding." Under this statute, an agent, who, having knowledge of previous insurance, subsequently issued a policy, waived the condition therein against such insurance purporting to render the policy void on account thereof: *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600, 31 N. W. 948; *St. Paul F. & M. Ins. Co. v. Shaver*, 76 Iowa, 282, 41 N. W. 19. Nor can the effect of the statute be obviated by a foreign insurance company doing business within the state by the insertions in its forms of application or policy of a clause expressly providing that the laws of its home office shall govern its contracts of insurance: *Mutual B. L. Ins. Co. v. Robinson*, 54 Fed. 580. The person thus by statute made the agent of the insurer, cannot be converted into the agent of the assured by any provision in the application, and if such agent fills up the application or makes representations or gives advice as to the character of the answers to be given by the applicant, his acts in these respects are the acts of and bind the insurer, notwithstanding a provision or requirement printed on the back of the policy when issued, that none of its terms can be modified or forfeitures waived except by an agreement in writing signed by the president or secretary, whose authority for this purpose will not be delegated: *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. Rep. 87, 33 L. ed. 341.

In Maine, all agents of insurance companies, foreign or domestic, are by statute declared deemed to be as in place of the company in all respects regarding any insurance effected by them, and all provisions contained in any policy in conflict with the statute are made null and void. The effect of this statute is to nullify a condition in a fire insurance policy to the effect that no act of any agent of the company other than its president or secretary shall be construed or held to be a waiver of a full and strict compliance with all the provisions of the policy, and the statute is not limited to agents through whom insurance is effected or to those whose names are borne on the policy, but extends to all agents of an insurance company; to agents appointed to investigate the circumstances attending fires and to adjust losses, as well as to those through whom insurance is effected: *Day v. Dwelling-House Ins. Co.*, 81 Me. 244, 16 Atl. 894.

In Wisconsin, a statute provides in substance that one who solicits insurance on behalf of any insurance company, or transmits an application of such company or a policy to or from such company, collects or receives any premium for insurance or in any manner aids or assists in doing either, or in transacting any business for such company, must be deemed and held to be an agent of such corporation to all intents and purposes in each of the several things mentioned. Under this statute, if a local agent performs acts in behalf of the company, and with its authority, it cannot disclaim his agency in the doing of anything implied in the specific acts authorized, and he may therefore waive a condition against pre-existing encumbrances known to him before the policy issues: *Renier v. Dwelling-House Ins. Co.*, 74 Wis. 89, 42 N. W. 208; or a clause in the policy providing that the assured shall become a coinsurer on his failure to keep the property insured to four-fifths of its value: *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 285, 45 N. W. 221. After the policy had been issued and accepted, it was at one time thought that a mere local agent could not, under the provisions of this statute, waive conditions, the happening of which, after such issuing, by the terms of the policy, made it void; *Knudson v. Hekla Fire Ins. Co.*, 75 Wis. 198, 43 N. W. 954; *Carey v. German-American Ins. Co.*, 84 Wis. 80, 36 Am. St. Rep. 907, 54 N. W. 18, 20 L. R. A. 267; *Oshkosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 510, 66 N. W. 525. In 1891, the legislature provided for what is commonly known as the "Wisconsin standard policy," to which all fire insurance policies issued in the state were required to conform, and while additional conditions were permitted to be written or attached to the policy, they were required to be in no case inconsistent with or a waiver of any of the provisions or conditions of the standard policy. It was thereafter thought that a local agent could not either in writing or by parol at the time an insurance was effected, change or waive any provision of the standard policy prohibiting future insurance: *Bourgeois v. Northwestern Nat. Ins. Co.*, 86 Wis. 606, 57 N. W. 347. If an agent issued a policy with knowledge of facts showing that a condition thereof had been broken, such knowledge was imputed to his principal, and his subsequent conduct in issuing the policy constituted a waiver of the condition. So, also, the acts of an adjuster might constitute the waiver of a forfeiture, notwithstanding a provision in the policy that the company should not be held to have waived any provision or condition in the policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to appraisal or any examination therein provided for, nor was such waiver prevented by a provision that no officer, agent, or other representative of the company, shall have power to waive any provision or condition of the policy, except such as by its terms may be the subject of an agreement indorsed thereon or added thereto: *Dick v.*

Equitable Fire etc. Ins. Co., 92 Wis. 46, 65 N. W. 742. The statute of Wisconsin, upon this subject as amended in 1898, reads: "Whoever solicits insurance on behalf of any person desiring insurance of any kind, or transmits an application for, or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation shall be held to be an agent of such corporation to all intents and purposes, unless it can be shown that he received no compensation for his services." Construing this statute, it was held that a broker who obtained insurance for another from the regular agent of the insurance company, and who received the policy, collected the premium, and paid it over to such agent was, as to such transaction, a general agent of the company, and that his knowledge at the inception of the contract that the assured had a leasehold interest only was deemed "to be that of the company the same as if he were regularly employed by it as its general agent." It was further held that the operation of the standard policy law of the state was not such as to prevent the operation of the rule, and that, therefore, the insurer could not avoid the payment of the loss on the ground of the condition of the title of the assured, and that such condition was not stated in the policy or application. The court said that independent of any statutory change, the following propositions were "firmly established: 1. Knowledge of an agent of an insurance company at the time of delivering one of its policies, of facts regarding the subject of the insurance inconsistent with the stipulations in the policy in respect thereto, is in legal effect knowledge of the company; 2. A person who delivers the policy and receives the premium, though acting as a broker, is also agent for the company within the foregoing rule by force of the statute; 3. If an insurance company delivers one of its policies and receives the premium therefor, with knowledge of facts rendering it void when its terms are applied to such facts, in legal effect it thereby assures its customer that as regards the contract the condition of the property shall be considered in all respects according to the calls of such contract, regardless of the truth of the matter, and invites him to rely thereon; and such invitation being accepted, the company is estopped from thereafter changing its position to the prejudice of the assured, though the policy declares that no condition thereof is subject to waiver except by written agreement indorsed thereon or added thereto; 4. The doctrine of waiver, strictly so called, is not involved in the last foregoing rule. It rests solely on the principle of estoppel in pais—the principle that one person cannot assume a position in his business relations with another in respect to a contract of a pecuniary nature upon which such other, acting reasonably, has a right to rely,

and after such other has so acted, change his position to that other's prejudice and obtain judicial aid to enable him to effectuate his fraudulent purpose." The court next proceeded to consider the question whether the adoption of the standard policy law had changed the foregoing rule, and said that, while there was some warrant for this contention, that a careful examination of all the decisions bearing on the subject showed that the court had not committed itself to that effect, and finally concluded: "After a careful consideration of the matter, we are unable to discover any very good reason for holding that it was intended by the legislature, in enacting the standard policy law, to abrogate the judicial rule so firmly established as above indicated"; and that "in the supporting authorities it appears that there was no judicial hesitation in holding that a policy like ours does not, in letter or in spirit, affect the established rule that an insurance company, barring fraud upon it, participated in by the insured and its agent, cannot avoid the effect of the law charging it with knowledge which its agent has at the time of delivering its policy of insurance, respecting the condition of the subject thereof": *Welch v. Fire Assn.*, 120 Wis. 456, 98 N. W. 227.

4. **Clerks and Like Assistants.**—In *Waldman v. North British & M. Ins. Co.*, 91 Ala. 170, 24 Am. St. Rep. 883, 8 South. 666, it was held that a clerk employed by an insurance agent, without the knowledge of the company, and authorized by the agent to fill out and issue policies, sign the agent's name, and indorse the rate of insurance on policies, was not the agent of the company, and that, though the agent had power to waive any forfeiture of the policy for additional insurance, effected without the consent of the company, he could not delegate such authority to his clerk, and hence that a waiver of such forfeiture by the clerk could not be imputed to the company. Whether there was anything in the particular circumstances of the case to justify this holding we need not proceed to inquire. It may be possible that insurance agencies may be established and their business carried on in districts and under circumstances where the employment of a clerk or other assistants cannot reasonably be anticipated by the insurer. The exact reverse of this is, however, usually the case. Insurance agents not only may, but they usually do, act through and with the aid of clerks or other assistants, and the higher the rank of the agent, the more likely his employment of clerical and like aid, and where clerks are employed and the business of the agency committed to their care, there is no serious doubt that their acts in the line of their employment are, in their consequences, the acts of the agent employing them, and notices given to them are as effective as if given to their employer. What shall be the effect of acts so done and notices so given is to be ascertained by inquiring what would be their effect if done by, or given to, the agent by whom

such clerks were employed. If the doing of the acts by, and the giving of the notice to, him would bind the company, then it is bound, for the action of the clerks is his and its action, and the knowledge of the clerks is his and its knowledge: *Fitzgerald v. Hartford L. & A. Ins. Co.*, 56 Conn. 116, 7 Am. St. Rep. 288, 13 Atl. 673, 17 Atl. 411; *Indiana Ins. Co. v. Hartwell*, 128 Ind. 177, 24 N. E. 100; *Mayer v. Mutual Life Ins. Co.*, 28 Iowa, 304, 18 Am. Rep. 34; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600, 31 N. W. 948; *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; *Equitable Life Assur. Soc. v. Brobst*, 18 Neb. 526, 26 N. W. 204; *German Ins. Co. v. Rounds*, 35 Neb. 752, 53 N. W. 660; *Heath v. Springfield Fire Ins. Co.*, 58 N. H. 414; *Arff v. Star Fire Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721, 25 N. E. 1073, 10 L. R. A. 609; *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298, 31 N. E. 1015; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 23 Am. St. Rep. 62, 13 S. E. 226; *Bergeron v. Pamlico Ins. etc. Co.*, 111 N. C. 45, 15 S. E. 883; *Hartford Fire Ins. Co. v. Jacey*, 6 Tex. Civ. App. 290, 25 S. W. 685; *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13, 26 S. W. 763; *Goode v. Georgia Home Ins. Co.*, 92 Va. 292, 53 Am. St. Rep. 817, 23 S. E. 744, 30 L. R. A. 842; *Deitz v. Providence-Washington Ins. Co.*, 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50.

b. *Notice of Agent's Want of Authority.*—"The acts of an agent performed within the scope of his real or apparent authority, are binding upon his principal. It is enough if, under all the circumstances, he had apparent authority in the matter, although in fact his authority was limited." "As to third parties, the agent should, in the absence of notice to the contrary, be regarded as possessing all the powers his occupation fairly imports to the public. Under this rule, an agent who solicits the insurance, takes the application, receives the premium and delivers the policy may, in our opinion, by his conduct or acts, bind his company, by way of waiver of a forfeiture on account of additional insurance, in the absence of knowledge upon the part of the assured that his powers in this respect have been restricted." The consequence of this is, that an insured or a person contemplating insurance is entitled, in dealing with the agent, whether local or general, to assume that he has full powers respecting the matters in which he is acting, in the steps preliminary to the insurance, and in issuing the policy, and if the authority which the agent is otherwise deemed to possess has in fact been limited, the limitation must be brought home to the knowledge of the assured: *California Ins. Co. v. Gracey*, 15 Colo. 70, 22 Am. St. Rep. 376, 24 Pac. 577; *Royal Neighbors v. Bowman*, 75 Ill. App. 566; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. 453; *Howard Ins. Co. v. Owen's Admr.*, 14 Ky. Law Rep. 881, 21 S. W. 1037; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840; *Hahn v. Guardian Ins. Co.*, 23 Or. 576, 37 Am.

St. Rep. 709, 32 Pac. 683. The question respecting which doubt arises, and must continue to exist after examining the authorities, is whether and when the assured must be deemed to have notice of limitations upon the agent's authority expressed in the application or policy. It is a fact well known and of which courts might take judicial knowledge that the course of business is such that the assured is generally brought in direct connection with the soliciting or local agent, with whom he really makes the agreement for insurance, and upon whose promises and representations almost implicit reliance is made. The policy is generally received at a later date, and is supposed to conform to the representations made by the agent. It is rarely read, and generally contains a multitude of conditions in print so small as to weary the eyes of all who are not possessed of the utmost strength and clearness of vision. Nevertheless, we think the tendency of the adjudications, and especially of the more recent and of courts of the highest rank, if it be assumed that there can be a difference in the rank of courts of last resort, is toward charging the assured with notice of all limitations upon the authority of the agent of which he must have been informed, had he read his policy. This is more especially true when the limitation relates to events which may occur after the issuing of the policy and on account of which it may become forfeited: *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; *Weidert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242. This rule has been applied in what must be regarded as extreme cases: *Liverpool & L. & G. Ins. Co. v. Richardson*, 11 Okla. 585, 69 Pac. 938; *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252; *Northern Assur. Co. v. Grand View Bldg. Assn.*, 183 U. S. 308, 88 Sup. Ct. Rep. 133, 46 L. ed. 213. These cases, however, by no means meet with universal acquiescence. In the dissenting cases each depends somewhat upon its particular circumstances, and in each there was some circumstance, or such a course of dealing, that the court deciding it determined that the insurer was estopped from relying on the restriction found either in the application or policy, or both, which he sought to invoke in his protection: *Union Ins. Soc. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923, 44 S. E. 896; *Virginia Fire etc. Ins. Co. v. Richmond Min. Co.*, 102 Va. 429, 846, 46 S. E. 463.

III. Failure to Cancel Policy.

Generally the breach of a condition in a policy of insurance does not forfeit it absolutely. The condition was inserted for the benefit of the insurer, who may avail himself of it or not, as he may choose, after receiving information of the facts. We think the better rule is, that he must act with at least reasonable diligence in asserting his right of forfeiture, and cannot leave the assured under the delusion that his policy remains in force and then in-

form him to the contrary after he has suffered the loss against which he sought to indemnify himself by the insurance. Conceding that knowledge of the cause of forfeiture is brought home to the insurer, he must within reasonable time act upon it, and, failing to notify the assured of any action imperiling his rights, the forfeiture must be deemed waived. The usual method of notification to an assured is by the cancellation of his policy. Hence, the failure to cancel, when the insured has notice of a cause of forfeiture, is generally deemed an election that the contract may remain in force, and estops the insurer from subsequently insisting on the cause of forfeiture: *Cassimus v. Scottish Union etc. Ins. Co.*, 135 Ala. 256, 33 South. 163; *Williamsburg City F. Ins. Co. v. Carey*, 83 Ill. 453; *Phoenix Ins. Co. v. Johnston*, 143 Ill. 106, 32 N. E. 429; *Phoenix Ins. Co. v. Boyer*, 1 Ind. App. 329, 27 N. E. 628; *Hanover Fire Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 772; *Nedrow v. Farmers' Ins. Co.*, 43 Iowa, 24; *Swedish-American Ins. Co. v. Knudson*, 67 Kan. 71, 100 Am. St. Rep. 387, 72 Pac. 526; *Phoenix Ins. Co. v. Coomes*, 14 Ky. Law Rep. 603, 20 S. W. 900; *Osterloh v. New Denmark Mut. Home F. Ins. Co.*, 60 Wis. 126, 18 N. W. 749; post, subd. V, b, 7. The chief difficulty in applying this rule arises in those cases in which it is impossible to prove that the insurer had actual notice of the cause of forfeiture, and notice is sought to be imputed to him because of the knowledge of his agent. It may be conceded that if the authority of the agent related only to matters leading to, and terminating in, the delivery of the policy, notice to him of some subsequent cause of forfeiture will not be imputed to his principal. On the other hand, it is usually the duty, even of what is commonly called a local agent of an insuring corporation, to take some action when informed of a fact constituting a breach of a condition, and especially when the information is given to him for the purpose of having him take action for the purpose of keeping in force the contract of insurance. Under such circumstances, the better view is that when the insured has done all that it was his duty to do by giving the requisite notice to the agent, and the latter should have informed his principal, the latter, whether acting by his agent or otherwise, should have continued the policy in force or refused to do so, then the failure to take any action is an irrevocable election that the policy shall remain in force: *Phoenix Ins. Co. v. Johnston*, 143 Ill. 106, 32 N. E. 429; *Anthony v. German-American Ins. Co.*, 48 Mo. App. 65; *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380, 62 N. W. 895; *Norris v. Hartford Fire Ins. Co.*, 57 S. C. 358, 35 S. E. 572; *Pearlstone v. Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. 810. In a few cases views exactly the reverse of those above expressed have been approved. These cases proceed on the ground that by virtue of the terms of the policy in question they ceased

to be in effect upon the happening of the breach of the condition, and that some affirmative action was required on the part of the insurer to again revive them in being and effect, and hence that mere inaction creates no liability and gives rise to no estoppel against the insurer: *Johnson v. American Ins. Co.*, 41 Minn. 323, 48 N. W. 59; *Davey v. Glens Falls Ins. Co.*, Fed. Cas. No. 2500; *West End H. & L. Co. v. American Fire Ins. Co.*, 74 Fed. 114.

IV. Failure to Indorse Waivers as Expressly Required by the Policy.

Policies, even when expressly permitting waivers of breaches of condition to be made by agents, generally stipulate that no such waiver can exist unless indorsed on the policy. In considering the effect of this requirement conflicting rules of law appear, each of which has sometimes been conceded paramount effect, and the results have naturally been irreconcilable. On the one hand, it is insisted that it was clearly competent for the insurer, by apt words in its policy, to make the mode the measure of the power, and, on the other hand, that the insurer may always waive or abrogate its own restrictions; that it is necessarily charged with knowledge of facts communicated to its agents, and being so chargeable, application of the well-known doctrines of estoppel may preclude it from insisting on its restrictions, and particularly on the mode in which they may be waived. In California, speaking of a stipulation that the waiver of any agent increasing the risk could only be by agreement indorsed on the policy, the mode thus pointed out was declared to be the measure of the power: *Gladding v. California Farmers' Mut. Fire Ins. Assn.*, 66 Cal. 6, 4 Pac. 764; *Enos v. Sun Ins. Co.*, 67 Cal. 621, 8 Pac. 879. Certainly this is not the doctrine of the later decisions in that state: *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869. In Georgia, its code having provided that a contract of insurance must be in writing, it was held, though the owner of insured goods while actually engaged in their removal had been asked by the agent if he desired the policy transferred, and had replied, "By all means, if necessary," and the agent had consented to the removal and had made the necessary entry on the books, relying on which the insured continued the removal without taking out any new insurance, as apparently the insured would have removed his goods if the agent had not made this statement, that there was no such action on the alleged parol agreement as estopped the insurance company from insisting that the contract was not in writing: *Simonton v. Liverpool-London etc. Ins. Co.*, 51 Ga. 76. The supreme judicial court of Massachusetts has, with relation to the subjects considered in this note, always been, if possible, on the side of the insurer. In *Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. 265, 59 Am. Dec. 145, the assured obtained additional insurance of which due notice was given to

the agent of the insurer who had authority to consent thereto, but the policy, not being then presented, no indorsement could be made upon it. The agent assured the insured that this would make no difference, that he would make a memorandum on his book, and that this would answer every purpose. A recovery by the insured having been permitted by the trial court, its judgment was reversed on appeal. In a case in other respects similar, it appeared that the agent on receiving verbal notice of the additional insurance made a memorandum thereof in a book kept by him relating partly to insurance affairs and partly to his own private business. The plaintiff was nonsuited on the ground that if he did not see fit to accept the contract of insurance with the restriction upon his right to have other insurance, he might have rejected it entirely or might have refused to accept it until the proper indorsement was made on the policy; that, having accepted the policy, he could not be heard to say that he was ignorant of its terms, or that it was the fault of the insurer that the prior insurance was not duly indorsed on the policy: *Pendar v. American Mutual Ins. Co.*, 12 Cush. 469. In New York, though the agent was notified of the vacancy of insured premises and asked to consent thereto, which he did, and in response to the inquiry whether it was necessary to have the consent indorsed on the policy, replied that it was not, that he had indorsed it upon his book and it was all right, and he did in fact make a memorandum of his consent on his register. This was held not to dispense with the indorsement on the policy: *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5. On the other hand, where the agent, on being informed of a sale and that the interest of the original insured had become that of a mortgagee, thereupon gave a renewal and said it was all right, a recovery was sustained, though the defendant pleaded conditions in the policy providing that if the property should be sold, the policy should become void, and that a like result should follow if the interest of the insured was not truly stated therein, and that nothing less than distinct, specific agreement, clearly expressed, indorsed on the policy, should be construed as the waiver of any condition: *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415, 32 Am. Rep. 330. It is quite certain in this state that where it appears from the conversation between the agent and the insured that something further is to be done by the agent in the way of expressing or indorsing his consent, then that the condition of the policy is not waived, however full and accurate may be the information given to the agent of the causes of forfeiture: *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547, 32 N. E. 990; *Manchester v. Guardian Assur. Co.*, 151 N. Y. 88, 56 Am. St. Rep. 600, 45 N. E. 381. In the same state, where information was given to an agent of the intention to commence a suit to foreclose the mortgage, and he agreed that this might be done without injuring the rights of the assured under the

policy, it was held that the verbal consent did not constitute any waiver of the condition when the foreclosure suit rendered the policy void: *Nerselbach v. Norman*, 122 N. Y. 578, 26 N. E. 34; *Moore v. Hanover Fire Ins. Co.*, 141 N. Y. 219, 36 N. E. 191; *Woodside Brewing Co. v. Pacific Fire Ins. Co.*, 11 App. Div. 68, 42 N. Y. Supp. 620, 159 N. Y. 549, 54 N. W. 1095. We think the final result of these decisions is that no notice given to, or promise or agreement made by, an agent, though he had power to indorse the same upon the policy, can be effective unless such indorsement is actually made, unless, indeed, when notice is brought home to his principal, and the latter must be held estopped because it permitted the insured to be and remain in the belief that the condition had been waived and his policy continued in force. This view is also sustained by *Liverpool etc. Ins. Co. v. Richardson Lumber Co.*, 11 Okla. 585, 69 Pac. 938; *Egan v. Westchester Fire Ins. Co.*, 28 Or. 289, 42 Pac. 611; *Meigs v. London Assur. Co.*, 126 Fed. 781.

A preponderance of the authorities conflicts with those hereinbefore referred to in this subdivision, and fairly support the conclusion that when an agent, whether local or general, has authority to consent to the waiver of a condition, or a forfeiture arising from a breach thereof, and the assured gives all the requisite information to such agent and seeks his consent, which he in express terms or in effect purports to give, then the failure of the agent to perform his remaining duty, namely, that of making the requisite indorsement, is chargeable rather to the insurer than to the assured, and the latter, having done everything required of him, is not deprived of the benefit of the waiver which the agent intended to make, by the fact that he failed to indorse the consent in the manner prescribed by the policy: *Phoenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990, 39 Ill. App. 517; *Mattocks v. Des Moines Ins. Co.*, 74 Iowa, 233, 34 N. W. 174; *Liquid C. A. Mfg. Co. v. Phoenix Ins. Co.*, 126 Iowa, 225, 101 N. W. 749; *National Fire Ins. Co. v. Crane*, 16 Md. 260, 77 Am. Dec. 289; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506; *Farmers' Mut. Fire Ins. Co. v. Gargett*, 42 Mich. 289, 3 N. W. 954; *Copeland v. Dwelling-House Ins. Co.*, 77 Mich. 554, 18 Am. St. Rep. 414, 43 N. W. 991; *Pollock v. German Fire Ins. Co.*, 127 Mich. 460, 86 N. W. 1017; *Morgan v. Illinois Ins. Co.*, 130 Mich. 427, 90 N. W. 40; *Barnard v. National Fire Ins. Co.*, 38 Mo. App. 106; *Pelkington v. National Ins. Co.*, 55 Mo. 172; *Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 779; *Redstrake v. Cumberland Mut. Fire Ins. Co.*, 44 N. J. L. 294; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 23 Am. St. Rep. 62, 13 S. E. 236; *Melvin v. Insurance Co. of North America*, 2 Luz. Leg. Reg. 219; *Mentz v. Lancaster Fire Ins. Co.*, 79 Pa. St. 475; *Morrison v. Insurance Co. of North America*, 69 Tex. 353, 5 Am. St. Rep. 63, 6 S. W. 605; *Pennsylvania Fire Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. 55; *German*

Ins. Co. v. Cain (Tex. Civ. App.), 37 S. W. 657; Home M. Ins. Co. v. Nichols (Tex. Civ. App.), 72 S. W. 440.

V. Application of the Foregoing Rules.

a. To Breaches of Condition Antedating the Issuing of the Policy.

1. **General Rule.**—No court will sustain an insurer in delivering and receiving the premium for a policy which it knew to be void when issued. Hence, if an insurer has notice, before or at the time of issuing a policy, that some condition therein has already been broken, and the breach is by the policy declared to make it void, he must be conclusively held to intend to waive that condition, for otherwise he would be delivering and accepting payment for a contract which he knew by its own terms was precluded from operating as a contract or performing any act of value to the assured. Furthermore, as we have already shown, the knowledge of the agent is imputed to the principal, and from this rule insurers are not exempt: Ante, subd. I, c. Hence, if an agent having authority to deliver the policy and collect the premium therefor has notice of a breach of such condition, the principal, in contemplation of law, having such notice, delivers such policy, and is estopped from claiming that it was void when delivered or has since become so because such breach preceded such delivery continued up to the time of the loss. Unless its language forbids such construction, the condition will be deemed to have been intended to apply only to matters arising after the issuing of the policy, and whether this interpretation is allowable or not, the insurer will be held estopped from relying on the condition: *Triple Link M. Ins. Assn. v. Williams*, 121 Ala. 138, 77 Am. St. Rep. 34, 26 South. 19; *Dwelling-House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115; *Bebee v. Hartford County Mut. Fire Ins. Co.*, 25 Conn. 51, 65 Am. Dec. 553; *Security Trust Co. v. Tarpey*, 182 Ill. 52, 54 N. E. 1041; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308, 21 N. W. 652; *Niagara Fire Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *Richards v. Washington F. & M. Ins. Co.*, 60 Mich. 420, 27 N. W. 586; *Emlaw v. Travelers' Ins. Co.*, 108 Mich. 554, 66 N. W. 469; *Improved Match Co. v. Michigan Mut. Fire Ins. Co.*, 122 Mich. 256, 80 N. W. 1088; *Andrus v. Maryland Casualty Co.*, 91 Minn. 358, 98 N. W. 200; *Soli v. Farmers' Mutual Ins. Co.*, 51 Minn. 24, 52 N. W. 979; *Anderson v. Manchester F. A. Co.*, 59 Minn. 182, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609; *Quigley v. St. Paul Title Ins. etc. Co.*, 60 Minn. 275, 62 N. W. 287; *Patten v. Merchants' etc. Mut. Fire Ins. Co.*, 40 N. H. 375; *Hadley v. New Hampshire Fire Ins. Co.*, 55 N. H. 110; *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; 78 Hun, 109, 29 N. Y. Supp. 250; *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390; *Benjamin v. Palatine Ins. Co.*, 177 N. Y. 588,

70 N. E. 1095; 80 N. Y. Supp. 256, 80 App. Div. 260; *Rowley v. Empire Ins. Co.*, 4 Abb. Ct. App. Dec. 131, 3 Keyes, 457, 36 N. Y. 450; *Commonwealth Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. St. 41; *London etc. Ins. Co. v. Ende*, 65 Tex. 118; *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. 478; *Hartford Fire Ins. Co. v. Post*, 25 Tex. Civ. App. 428, 62 S. W. 140; *Worachek v. New Denmark Mut. Home Fire Ins. Co.*, 102 Wis. 88, 78 N. W. 165; *Northern Assur. Co. v. Grand View Building Assn.*, 101 Fed. 77, 41 C. C. A. 297. Contra, *Tebbetts v. Hamilton Mut. Ins. Co.*, 3 Allen, 569; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52.

2. **The Failure to Prepay the Premium.**—According to some of the authorities, if a policy recites that the premium has been paid, the insurer is estopped from denying and disproving such payment: *Provident Life Ins. Co. v. Fennell*, 49 Ill. 180; *Teutonia Life Ins. Co. v. Mueller*, 77 Ill. 22; *Illinois C. Ins. Co. v. Wolf*, 37 Ill. 254, 87 Am. Dec. 251; *Massachusetts Ben. Life Assn. v. Sibley*, 57 Ill. App. 246; *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737; *Consolidated etc. Ins. Co. v. Cashow*, 41 Md. 59; *Goit v. National Protection Ins. Co.*, 25 Barb. 189; *Kendrick v. Mutual Benefit Life Ins. Co.*, 124 N. C. 315, 70 Am. St. Rep. 692, 32 S. E. 728; *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606, 24 Am. Rep. 344; *In re Insurance Co.*, 22 Fed. 109. We do not understand this position to be maintainable literally (*Millick v. Peterson*, 2 Wash. C. C. 31, Fed. Cas. No. 9601; *Miller v. Brooklyn Life Ins. Co.*, 12 Wall. 285, 20 L. ed. 398), but it is doubtless so far true that the insurer is not permitted to disprove such payment for the purpose of showing that the policy when issued was void. The agent who delivered the policy was acting within the apparent scope of his authority, if it was given to him for delivery. Restrictions in it, as we have heretofore shown (*ante*, subd. I, f), are considered as applying to matters occurring after its delivery, and hence a general stipulation that no agent shall have power to waive any of the conditions will not be construed as applying to the first payment of premium: *Miller v. Brooklyn Life Ins. Co.*, 12 Wall. 285, Fed. Cas. No. 9564. Without stopping to further consider the reasons by which the rule has been or may be supported, it may be affirmed that the great majority of our courts hold that if a policy is delivered without the prepayment of premium under such circumstances that the insured is under an implied obligation to make such payment, the policy will not be held void at its inception. The agent who delivered it will be presumed to have given credit, and to have been authorized to do so, and this notwithstanding general statements in the policy requiring premium to be paid in advance and declaring that no agent is authorized to waive any of the conditions of the policy: *American Employers' L. Ins. Co. v. Fordyce*, 62 Ark. 562, 54 Am. St. Rep. 305, 36 S. W. 1051; *Farnum v. Phenix Ins. Co.*, 83 Cal.

246, 17 Am. St. Rep. 238, 23 Pac. 869; Griffith v. New York Life Ins. Co., 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113; Berliner v. Travelers' Ins. Co., 121 Cal. 458, 66 Am. St. Rep. 49, 53 Pac. 918, 41 L. R. A. 467; Goseh v. State Mut. Fire Assn., 44 Ill. App. 263; Daft v. Drew, 40 Ill. App. 266; Kerlin v. National Acc. Assn., 8 Ind. App. 628, 35 N. E. 39, 36 N. E. 156; Bohler v. German Mut. Fire Ins. Co., 68 Ind. 347; Young v. Hartford Fire Ins. Co., 45 Iowa, 377, 24 Am. Rep. 784; Pino v. Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529; New York Life Ins. Co. v. Stone, 42 Mo. App. 383; Boehen v. Williamsburg City Ins. Co., 35 N. Y. 131, 90 Am. Dec. 787; Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Washoe T. M. Co. v. Hibernia Fire Ins. Co., 7 Hun, 74; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612; Universal Fire Ins. Co. v. Block, 109 Pa. St. 535, 1 Atl. 523; Elkins v. Susquehanna Fire Ins. Co., 113 Pa. St. 386, 6 Atl. 224; Lebanon M. Ins. Co. v. Hoover, 113 Pa. St. 591, 57 Am. Rep. 511, 8 Atl. 163; Equitable Ins. Co. v. McCrea, 8 Lea, 541; Stepp v. National Life & Maturity Assn., 37 S. C. 417, 16 S. E. 134; Wytheville L. & B. Co. v. Feiger, 90 Va. 277, 18 S. E. 195; Mason v. Citizens' Fire etc. Ins. Co., 10 W. Va. 572; Eagan v. Aetna Fire etc. Ins. Co., 10 W. Va. 583; Jones v. Aetna Ins. Co., Fed. Cas. No. 7453; Frankle v. Pennsylvania Fire Ins. Co., Fed. Cas. No. 5052a; Ball & S. W. Co. v. Aurora F. & M. Ins. Co., 20 Fed. 232; Peoria Sugar Refinery v. Susquehanna M. F. Ins. Co., 20 Fed. 480; O'Brien v. Union M. L. Ins. Co., 22 Fed. 586; Potter v. Phoenix Ins. Co., 63 Fed. 382.

Notwithstanding these decisions, it is now clear in many of the states that, by the use of proper terms in the application or policy, the insurer may provide that it shall not become in force until actual payment of the premium, and, in the case of life insurance, that such payment must be made while the applicant remains in good health, and that a policy issued in advance of such payment is void, unless the circumstances attending its delivery, or the custom of doing business, shows that the insurer is estopped from relying upon the condition: Carter v. Cotton States Life Ins. Co., 56 Ga. 237; Reese v. Fidelity Mutual Life Assn., 111 Ga. 482, 36 S. E. 637; Wilkins v. State Ins. Co., 43 Minn. 177, 45 N. W. 1; Russell v. Prudential Ins. Co., 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252; Ormond v. Fidelity Life Assn., 96 N. C. 158, 1 S. E. 796; Oliver v. Mutual Life Ins. Co., 97 Va. 134, 33 S. E. 536.

3. Conditions Against Premises Being Vacant and Unoccupied.— If, at the time the policy issues, the insured premises are vacant, and it provides that if they are so vacant it shall be void, this is a proper case for the application of the general rule that notice to an agent must be imputed to his principal, and the principal having, in contemplation of law, issued its policy and received the premium with such knowledge, is estopped from avoiding pay-

ment in case of a loss on the ground that the policy was void when issued: *Ohio Farmers' Ins. Co. v. Vogel* (Ind. App.), 73 N. E. 612; *Queen Ins. Co. v. Straughan*, 70 Kan. 186, 78 Pac. 447; *Queen Ins. Co. v. Kline* (Ky.), 32 S. W. 214; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272, 42 Atl. 412; *Aurora Fire etc. Ins. Co. v. Kranich*, 36 Mich. 289; *Liverpool etc. Ins. Co. v. McGuire*, 52 Miss. 227; *McCollum v. Hartford Fire Ins. Co.*, 67 Mo. App. 76; *Prendergast v. Dwelling-House Ins. Co.*, 67 Mo. App. 426; *German Ins. Co. v. Penrod*, 35 Neb. 273, 53 N. W. 74; *Rochester L. & B. Co. v. Liberty Ins. Co.*, 44 Neb. 537, 48 Am. St. Rep. 745, 62 N. W. 877; *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N. W. 1106; *Carr v. Roger Williams Ins. Co.*, 60 N. H. 513; *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133; *Short v. Home Ins. Co.*, 90 N. Y. 16, 43 Am. Rep. 138; *Haight v. Continental Ins. Co.*, 92 N. Y. 51; *Blass v. Agricultural Ins. Co.*, 46 N. Y. Supp. 392, 18 App. Div. 481; *Devine v. Home Ins. Co.*, 32 Wis. 471. Though the policy cannot be avoided on account of the premises being vacant and unoccupied at the time it issues, it may be avoided on account of the continuance of such vacancy, as where the condition is that the policy shall be void if the premises be and remain vacant for a specified number of days, in which event, though the vacancy was known when the policy was issued, it may, nevertheless, be avoided on the continuance of the condition stipulated against for the specified number of days after the issuing of the policy: *Ranspach v. Teutonia Ins. Co.*, 109 Mich. 699, 67 N. W. 967; *Queen Ins. Co. v. Chadwick*, 13 Tex. Civ. 318, 35 S. W. 26; *Connecticut Fire Ins. Co. v. Tilley*, 88 Va. 1024, 29 Am. St. Rep. 770, 14 S. W. 851; *England v. Westchester Fire Ins. Co.*, 81 Wis. 583, 29 Am. St. Rep. 917, 51 N. W. 954.

4. **The Condition of the Title.**—It is generally the duty of the agent soliciting and receiving applications for insurance to inquire respecting the title of the applicant and to exact statements concerning it, which are usually written out by him in the application, and the policy, further, ordinarily contains a condition that, unless the title is truly stated, or the assured is the unconditional owner, or if the building stands on leased ground, the policy is void, unless it contains a stipulation or notice showing the true state of the title. If an agent so far fails in his duty as not to make any inquiry respecting the title, and delivers the policy without any knowledge, his principal is not estopped from relying on the condition on the subject in the policy, on the ground that the agent, had he made such inquiry, would have ascertained the truth: *Pope v. Glens Falls Ins. Co.*, 136 Ala. 670, 34 South. 29. But if the condition of the title was truly represented to the agent, or knowledge otherwise came to and was possessed by him, while acting in the discharge of his duties and before the delivery of the policy, such knowledge is imputed to his principal, and the policy cannot be avoided by the latter because the title

is not correctly stated therein or in the application: *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 South. 379; *Pope v. Glens Falls Ins. Co.*, 130 Ala. 356, 30 South. 496; *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138; *American Central Ins. Co. v. Donlon*, 16 Colo. App. 416, 66 Pac. 249; *Mechanics' etc. Ins. Co. v. Mutual Real Estate etc. Assn.*, 98 Ga. 262, 25 S. E. 457; *Phenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779; *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, ante, p. 92, 51 S. E. 339; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Germania Fire Ins. Co. v. Hick*, 23 Ill. App. 381, 125 Ill. 361, 8 Am. St. Rep. 384, 17 N. E. 792; *German Ins. Co. v. Miller*, 39 Ill. App. 633; *Danvers M. F. Ins. Co. v. Schertz*, 95 Ill. App. 656; *Home Ins. Co. v. Duke*, 84 Ind. 253; *Jacobs v. St. Paul Fire etc. Ins. Co.*, 86 Iowa, 145, 53 N. W. 101; *Born v. Home Ins. Co.*, 120 Iowa, 299, 94 N. W. 849; *Rhode Island U. Assn. v. Monarch*, 98 Ky. 305, 32 S. W. 959; *Mutual Fire Ins. Co. v. Hammond*, 106 Ky. 386, 50 S. W. 545; *London & Lancashire Ins. Co. v. Gerteison*, 106 Ky. 815, 51 S. W. 617; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 289, 65 S. W. 611; *Ahlberg v. German Ins. Co.*, 94 Mich. 259, 53 N. W. 1102; *Clawson v. Citizens' Mutual Fire Ins. Co.*, 121 Mich. 591, 80 Am. St. Rep. 538, 80 N. W. 573; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 South. 13; *Southern Ins. Co. v. Stewart (Miss.)*, 30 South. 755; *O'Brien v. Greenwich Ins. Co.*, 95 Mo. App. 301, 68 S. W. 976; *Ormsby v. Laclede Fire etc. Ins. Co.*, 93 Mo. App. 371, 72 S. W. 139; *Parsons v. Knoxville Ins. Co.*, 132 Mo. 583, 31 S. W. 117, 34 S. W. 476; *Leach v. Republic Fire Ins. Co.*, 58 N. H. 245; *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434; *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; *Brooks v. Erie Fire Ins. Co.*, 78 N. Y. Supp. 748, 76 App. Div. 275; *Grabbs v. Farmers' Mutual Fire Assn.*, 125 N. C. 389, 34 S. E. 503; *Clapp v. Farmers' Mut. Fire etc. Assn.*, 126 N. C. 388, 35 S. E. 617; *Cowell v. Phoenix Ins. Co.*, 126 N. C. 684, 36 S. E. 184; *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 76 Am. St. Rep. 450, 57 Pac. 62; *Graham v. American Fire Ins. Co.*, 48 S. C. 195, 59 Am. St. Rep. 707, 26 S. E. 323; *Wagner v. Westchester Fire Ins. Co.*, 92 Tex. 549, 50 S. W. 569; *Westchester Fire Ins. Co. v. Wagner*, 24 Tex. Civ. App. 140, 57 S. W. 876; *West v. Norwich Union Fire Ins. Co.*, 10 Utah, 442, 37 Pac. 685; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. 101; *Goss v. Agricultural Ins. Co.*, 92 Wis. 233, 65 N. W. 1036; *St. Clara Academy v. Northwestern Nat. Ins. Co.*, 98 Wis. 257, 67 Am. St. Rep. 805, 73 N. W. 767.

5. **The Condition Respecting Encumbrances.**—There is no reason why the rule just stated concerning the condition of the title of the assured should not be applicable to the condition usually found in insurance policies against pre-existing encumbrances not specified therein. Perhaps if the condition is imposed by the charter of the insuring corporation, which must be construed as excluding it from

the exercise of the power of insuring without in the policy exacting this condition, it may not be susceptible of waiver by the insurer or any of its agents: *Leonard v. American Ins. Co.*, 97 Ind. 299. See ante, subd. I, a, 1. Unless we concede this exception to be maintainable, if an agent, in making out the application, fails to truly enter the statement made to him by the applicant respecting encumbrances existing on the property, this fault of the agent must be imputed to the insurer and not to the assured, unless the latter and the agent act in complicity, and whenever the agent, at or before the delivery of the policy, has knowledge of pre-existing encumbrances, his knowledge is that of his principal, and the subsequent issuing of the policy with such knowledge is an irrevocable waiver of the condition against pre-existing encumbrances though not mentioned therein: *Cowart v. Capital City Ins. Co.*, 114 Ala. 356, 22 South. 574; *Breedlove v. Norwich Union Fire Ins. Soc.*, 124 Cal. 164, 56 Pac. 770; *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453; *Clay v. Phoenix Ins. Co.*, 97 Ga. 44, 25 S. E. 417; *Phoenix Ins. Co. v. La Pointe*, 17 Ill. App. 248, 118 Ill. 384, 8 N. E. 353; *American Ins. Co. v. Luttrell*, 89 Ill. 314; *Fire Assn. v. Yeagley*, 34 Ind. App. 387, 72 N. E. 1035; *Bowling v. Phoenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; *German-American Ins. Co. v. Yeagley*, 163 Ind. 651, 71 N. E. 897; *Huntley v. Home Ins. Co.*, 42 Iowa, 709; *German Ins. Co. v. Gray*, 43 Kan. 497, 19 Am. St. Rep. 150, 23 Pac. 637, 8 L. R. A. 70; *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586; *Hartford Fire Ins. Co. v. McCarthy*, 69 Kan. 555, 57 Pac. 90; *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41; *Baker v. Ohio Farmers' Ins. Co.*, 70 Mich. 199, 14 Am. St. Rep. 485, 38 N. W. 216; *Russell v. Detroit Mut. Fire Ins. Co.*, 80 Mich. 407, 45 N. W. 356; *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646, 48 N. W. 296; *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514, 32 Am. St. Rep. 519, 53 N. W. 818, 18 L. R. A. 481; *Breckinridge v. American Central Ins. Co.*, 87 Mo. 62; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Robbins v. Springfield Fire etc. Ins. Co.*, 149 N. Y. 477, 44 N. E. 59; *Hornthal v. Western Ins. Co.*, 88 N. C. 71; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 57 Am. Dec. 684; *Vesey v. Commercial Union Assur. Co. (S. Dak.)*, 101 N. W. 1074; *German Ins. Co. v. Everett*, 18 Tex. Civ. App. 514, 46 S. W. 95; *Ring v. Windsor County Mut. Fire Ins. Co.*, 51 Vt. 563; *Tarbell v. Vermont Mut. Fire Ins. Co.*, 63 Vt. 58, 22 Atl. 533; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366; *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 13, 78 N. W. 160; *Renier v. Dwelling-House Ins. Co.*, 74 Wis. 89, 42 N. W. 208; *Bourgeois v. Mutual Fire Ins. Co.*, 86 Wis. 402, 57 N. W. 38; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. 34; *London & Lancashire F. Ins. Co. v. Fischer*, 92 Fed. 500, 34 C. C. A. 503; *McElroy v. British-American Assur. Co.*, 94 Fed. 990, 36 C. C. A. 615; *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. Rep. 87, 33 L. ed. 341.

As we have heretofore shown (ante, subd. I, c, 2), there has been some dissent from the proposition that statements in an application, though due to the insurer's agent, are imputed to it. Where this dissent prevails, insurers have been allowed to escape liability on account of encumbrances existing at the time insurance was effected and known to their agents: *Richardson v. Maine Ins. Co.*, 46 Me. 304, 74 Am. Dec. 459; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. 127. In Pennsylvania, if the assured knows what is the answer which the agent has written down respecting encumbrances, though there is no collusion between them, it may avoid the policy, though it does not conform to the answer given the agent by the assured, and such answer as so given truly stated the fact of the encumbrance, and thus made it known to the agent: *Blooming Grove Mut. Fire Ins. Co. v. McAnerney*, 102 Pa. St. 335, 48 Am. Rep. 209.

6. **Forbidden Use of the Premises or the Keeping of Extra-hazardous Articles Therein.**—Conditions in policies of insurance against the destruction of the property by fire that certain specified articles shall not be kept stored therein, such as gasoline or other inflammable articles, or gunpowder, or other explosives, are subject to the general rule that the knowledge of the agent is imputed to his principal, and hence if the agent knows when the policy issues that the condition has been, and is being violated, and therefore that the policy is void at its inception if the condition is to prevail, it must be deemed waived: *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91, 1 Am. St. Rep. 42, 13 Pac. 156; *Farmers' etc. Ins. Co. v. Nixon*, 3 Colo. App. 265, 30 Pac. 42; *State Ins. Co. v. Taylor*, 14 Colo. 400, 20 Am. St. Rep. 281, 24 Pac. 338; *Imperial Fire Ins. Co. v. Shimer*, 96 Ill. 530; *Rockford v. Warne*, 22 Ill. App. 19; *Kenton Ins. Co. v. Downs*, 90 Ky. 236, 13 S. W. 682; *Steers v. Home Ins. Co.*, 38 La. Ann. 952; *Peoria etc. Fire Ins. Co. v. Hall*, 12 Mich. 202; *Hartley v. Pennsylvania Fire Ins. Co.*, 91 Minn. 382, 103 Am. St. Rep. 512, 98 N. W. 198; *Rivara v. Queen Ins. Co.*, 62 Miss. 720; *Wheeler v. Traders' Ins. Co. (N. H.)*, 1 Atl. 298. Contra, *Birmingham Fire Ins. Co. v. Kroegher*, 88 Pa. St. 64, 24 Am. Rep. 147.

7. **Conditions Against Pre-existing Insurance.**—Under this heading we must refer to those decisions giving special effect to conditions or limitations contained in the charter of insuring corporations by which it has been held that neither the insurer nor its agents can waive pre-existing insurance when not specified in the policy: Ante, subd. I, a, 1; *Barrett v. Union M. F. Ins. Co.*, 7 Cush. 175; *Batchelder v. Queen Ins. Co.*, 135 Mass. 449; *Bennett v. St. Paul Fire etc. Ins. Co.*, 55 N. J. L. 377, 27 Atl. 641. Subject to this limitation in those states where its existence is conceded, a policy cannot be avoided because of pre-existing insurance not mentioned therein which was known to the insurer or its agent before the policy issued: *Fish-*

beck v. Phoenix Ins. Co., 54 Cal. 422; Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411; Johnson v. Farmers' Ins. Co., 126 Iowa, 565, 102 N. W. 502; Niagara Fire Ins. Co. v. Johnson, 4 Kan. App. 16, 45 Pac. 789; Phoenix Ins. Co. v. Spiers, 87 Ky. 285, 8 S. W. 453; Brandup v. St. Paul F. M. Ins. Co., 27 Minn. 393, 7 N. W. 735; Western Assur. Co. v. Phelps, 77 Miss. 625, 27 South. 745; Equitable Fire Ins. Co. v. Alexander (Miss.), 12 South. 25; American Fire Ins. Co. v. First Nat. Bank, 73 Miss. 469, 18 South. 931; Pelkington v. National Ins. Co., 55 Mo. 172; Spalding v. New Hampshire Fire Ins. Co., 71 N. H. 441, 52 Atl. 858; Goldwater v. Liverpool etc. Ins. Co., 39 Hun, 176, 109 N. Y. 618, 15 N. E. 895; Stage v. Home Ins. Co., 78 N. Y. Supp. 555, 76 App. Div. 509; Koshland v. Home Ins. Co., 31 Or. 321, 49 Pac. 864, 50 Pac. 567; Reid v. Equitable Fire etc. Ins. Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496; McBryde v. South Carolina M. Ins. Co., 55 S. C. 589, 74 Am. St. Rep. 769, 33 S. E. 729; Osborne v. Phenix Ins. Co., 23 Utah, 428, 64 Pac. 1103; Roberts v. Continental Ins. Co., 41 Wis. 321.

In subdivision I, e, 2, we referred to cases which we regarded as departing from the general rule of the authorities relating to the subject here under discussion. In considering every department of that subject these cases must be remembered because in their support is the very great authority of the supreme court of the United States. In Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 22 Sup. Ct. Rep. 133, which was an action on a policy insuring property against destruction by fire, the defense to pre-existing insurance not mentioned in the policy was interposed. The condition relied on provided that the policy should be void "if the insured now has or shall hereafter make or procure any other contract of insurance." The policy also provided that it was "made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added thereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition in this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached." The plaintiff pleaded that the existence of the insurance relied upon by the defendant was personally known to its agent who wrote the policy and accepted the risk, and who then had full charge of the defendant's agency at Lincoln, Nebraska, with authority to accept fire insurance risks for and on behalf of the defendant, to counter-

sign and issue its policies of insurance, and to collect and receive the premiums therefor, and that, at and prior to his acceptance of the risk, the plaintiff, by its president, had reported to such agent the fact of the subsisting insurance, and he, as such agent, with full knowledge of the fact, accepted the risk and wrote, executed, and delivered the policy to the plaintiff with intent on the part, both of the plaintiff and the defendant, that the same should be concurrent and subsisting insurance and not avoided or affected by the defendant's policy, and with the purpose knowingly to waive and forego all benefit of the provisions of the policy set forth in its answer. Though there was a conflict of evidence, the jury found the issues against the defendant, returning a special verdict on which judgment was entered in favor of the plaintiff. This judgment, on writ of error, was reversed, and the general conclusion of the court upon the subject involved was expressed as heretofore shown at the end of subdivision II, a, 2.

8. **The Iron-safe Clause, and Conditions Respecting the Taking of Inventories and the Mode of Keeping Books.**—Many insurance policies contain requirements or stipulations respecting the time and mode of making inventories, and the keeping of books, and that such books shall be kept in an iron safe or other depository intended for the purpose of preventing or making less probable their destruction by fire. Such requirements may be regarded both as relating to the condition existing at the time the policy was issued, and the condition which is to be maintained afterward. The weight of authority is, we think, the same as with respect to the other conditions we have been considering. If the agent delivering the policy knows that at and before the delivery the books are not kept in the manner or in the depository provided for, then it is not open to his principal to avoid the policy for the breach of the condition: *Sprott v. New Orleans Ins. Co.*, 53 Ark. 215, 13 S. E. 799; *Niagara Fire Ins. Co. v. Brown*, 24 Ill. App. 224, 123 Ill. 356, 15 N. E. 166; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 65 S. W. 611; *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 48 Am. St. Rep. 535, 18 South. 86; *Phoenix Ins. Co. v. Randle*, 81 Miss. 720, 33 South. 500. Strictly speaking, conditions on these subjects are less in the nature of conditions avoiding the insurance than they are agreements between the insurer and the insured that a course of business shall be pursued by the latter which will make fraud on his part more difficult of success. Hence the inclination of many of the courts toward holding the insured to his agreement, irrespective of what had been the course of business before he entered into it: *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595; *Sowers v. Mutual Fire Ins. Co.*, 113 Iowa, 551, 85 N. W. 763; *Rundell v. Anchor Fire Ins. Co. (Iowa)*, 101 N. W. 517; *Gillum v. Fire Assn.*, 106 Mo. App. 673, 80 S. W. 283; *Roberts W. & T. Co. v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955; *Maupin v. Scottish Union & Mut. Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003.

b. Breaches of Condition Occurring After Issuing the Policy.

1. **General Rule.**—It is perhaps not correct to say that the general rules applicable to breaches of condition occurring after the issuing of the policy differ from those applicable to pre-existing breaches of condition, except that, in the former class of cases, the insurer cannot be accused of making a contract and accepting premiums therefor when by its terms, if strictly applied, it must be nugatory. It must be equally true, however, in both classes of cases that the knowledge of the agent is imputed to the insurer, and that where the insurer will be bound or estopped by his actual knowledge, he will also be bound or estopped by the knowledge of his agent. The chief difficulty is in determining with relation to waivers by alleged agents of breaches of condition occurring after the issuing of policy whether in such waivers, whether expressed or implied, such agents really represented, and were authorized to represent, the insurer. In taking an application for insurance, collecting premiums, and delivering policies, it is clear that insurance agents represent their principals, and perhaps equally clear, that the knowledge which they acquire in the discharge of what are professedly their duties must be imputed to their principals. On the other hand, after a policy has been delivered, there is no presumption that the agent for its delivery and for all the proceedings which led up to it has any other duty to perform between the insurer and the insured. Hence, we apprehend that the burden of proving any further duty rests upon him who asserts it, and if it is claimed that a breach of condition occurring after the issuance of the policy was consented to or waived by an agent of the insurer, it should be proved, in support of the claim, either that such consent or waiver was brought to the knowledge of the principal and ratified expressly or by implication, or that some duty had by the principal been imposed on the agent in the discharge of which the latter was competent to give the consent or waive the forfeiture in question.

2. **Delay in Paying Premiums Falling Due After the Delivery of the Policy.**—As to installments of premium becoming due after the delivery of a policy and after it is conceded to have been in force as a binding contract between the parties, though the policy on its face declares that it shall become void if such policies are not paid when due or at stated times specified therein, there is no doubt that the insurer may waive these conditions and permit the policy to remain in force, and in electing to do so, may act by its agents in any mode it may choose, notwithstanding any stipulation in the policy to the contrary. The establishment of the authority of the professed agent to act for an insurer is, however, more difficult than in the case of the payment of the original premium which is essential on the inception of the contract. The agent who had authority to deliver the policy and to collect the original premium

is not thereby authorized to act in relation to subsequently accruing premiums: *Bouten v. American Mut. Life Ins. Co.*, 25 Conn. 542; *Critchett v. American Ins. Co.*, 53 Iowa, 404, 36 Am. Rep. 230, 5 N. W. 542. Of course, if a premium is paid to an agent after it falls due, and he reports such payment to his principal, and it, with knowledge of the facts, receives or retains the money, the forfeiture is thereby waived, whether the agent had authority in the first instance or not: *Piedmont etc. Life Ins. Co., v. Lester*, 50 Ga. 812; *Union Cent. Ins. Co. v. Whetsel*, 29 Ind. App. 658, 65 N. E. 15; *Walls v. Home Ins. Co.*, 114 Ky. 611, 71 S. W. 650; *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144, 98 Am. Dec. 73; *Cronin v. Fire Assn.*, 119 Mich. 74, 77 N. W. 648; *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. St. 259; *Chicago G. F. L. Sec. v. Ford*, 104 Tenn. 533, 58 S. W. 239. Where the facts do not establish a ratification by the insurer, the authority of the agent to waive a forfeiture arising from the nonpayment is not implied from the fact that he was the agent who acted in the steps leading up to and including the delivery of the policy, nor because of his authority to receive the subsequently accruing premiums: *Lewis v. Phoenix Mut. Life Ins. Co.*, 44 Conn. 72; *Rundell v. Anchor Fire Ins. Co. (Iowa)*, 101 N. W. 517; *Continental Ins. Co. v. Willets*, 24 Mich. 268; *Metropolitan Life Ins. Co. v. McGrath*, 52 N. J. L. 318, 19 Atl. 386; *Wall v. Home Ins. Co.*, 8 Bosw. 597, 36 N. Y. 157; *Union Mut. Life Ins. Co. v. McMullen*, 24 Ohio St. 67; *Marland v. Royal Ins. Co.*, 71 Pa. St. 393. Nor generally can the assured act with safety on the advice or conduct of the agent in opposition to the terms of the policy: *Nixon v. Travelers' Ins. Co.*, 25 Wash. 254, 65 Pac. 195. As, however, the terms or conditions of a policy may be waived by the insurer acting through and by its agents, such waiver is inferable from custom, or, in other words, from the practice of agents in which their principal has acquiesced with actual knowledge of the practice or when it has been so open and long continued that the insurer cannot be permitted to deny its knowledge without working a fraud on those dealing with it: *Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1; *Mound City Mut. Life Ins. Co. v. Twining*, 19 Kan. 349; *Thompson v. St. Louis Mut. Life Ins. Co.*, 52 Mo. 469; *Wyman v. Phoenix Mut. Life Ins. Co.*, 19 N. Y. 274, 23 N. E. 907; *Bowman v. Agricultural Ins. Co.*, 2 Thomp. & C. 261, affirmed, 59 N. Y. 521; *Piedmont etc. Life Ins. Co. v. McLean*, 31 Gratt. 517; *Knickerbocker Life Ins. Co. v. Morton*, 96 U. S. 234, 24 L. ed. 689; *Phoenix Life Ins. Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. Rep. 18, 27 L. ed. 65; *Hartford etc. Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. Rep. 617, 36 L. ed. 492.

3. **Conditions Against the Premises Becoming Vacant and Unoccupied.**—If premises become vacant after the delivery of a policy, it may, we think, be safely assumed that knowledge of this

fact is not imputed to the insurer merely because it becomes known to the agent who negotiated for and delivered the policy, and hence that the insurer is not estopped from relying on such vacancy because of the knowledge of such agent. Mere expressions of opinion on the part of the local agent concerning the effect of a vacancy are not binding on his principal: *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Home Ins. Co. v. Scales*, 71 Miss. 975, 42 Am. St. Rep. 975, 15 South. 134. We have hereinbefore treated of the effect of a failure to cancel policies for known causes of forfeiture (ante, subd. III), and of the failure of an agent to indorse a consent or waiver on the policy after the facts had been made known to him and it became his duty to take action: Ante, subd. IV. The principles there stated are applicable when the cause of forfeiture relates to the premises having become vacant and unoccupied. The authorities are, as we have already shown, conflicting. Hence, some of them make such indorsement an indispensable condition: *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15, 19 Am. St. Rep. 118, 22 Pac. 1010; *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 28, 31 N. E. 265; *Weidert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242; while others estop the insurer from relying on the condition where the assured has done all that the policy requires of him, and the agent has merely omitted to perform his duty of indorsing, or refusing to indorse, his consent: *Palmer v. St. Paul Fire etc. Ins. Co.*, 44 Wis. 201; *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269, 20 Am. St. Rep. 69, 44 N. W. 1106; *Davey v. Glens Falls Ins. Co.*, Fed. Cas. No. 3590; *Depuy v. Delaware Ins. Co.*, 63 Fed. 680.

4. **Changes in the Title.**—Policies insuring property against destruction by fire usually stipulate that, in the event of any transfer or other change in the title being made, the policy shall become void unless consent to such change is indorsed thereon. The insurer may, nevertheless, without such indorsement, waive a breach of this condition, and does so when, after knowledge thereof, it subsequently receives the premium requisite to keep the insurance in force: *Moffit v. Phenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835; *Continental Ins. Co. v. Thomasson (Ky.)*, 84 S. W. 546; *Millis v. Scottish Union & N. Ins. Co.*, 95 Mo. App. 211, 68 S. W. 1066; *Virginia Fire etc. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 102 Am. St. Rep. 846, 46 S. E. 463. The question usually presented for consideration is, what is the effect of the failure of the agent to either indorse or refuse his consent after receiving due notice of a change, and upon this subject, as we have heretofore shown, the authorities are conflicting: Ante, subd. IV; *Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408; *Mattingly v. Springfield etc. Ins. Co. (Ky.)*, 83 S. W. 577; *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505, 14 Am. Rep. 304; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693, 9 Am. Rep. 479.

5. **Encumbrances Executed After the Delivery of the Policy.**—An agent furnished with blank applications and authorized to take risks and issue policies by signing his name, and to collect premiums and cancel policies, it is said, may waive the condition that a policy is void in case of an encumbrance being subsequently placed on the insured premises: *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 54 Am. St. Rep. 297, 35 S. W. 428. As a matter of fact, nearly all agents of insurers, local as well as general, are given authority to consent to encumbrances subsequently placed on the property, but are required to indorse such consent on the policy. Sometimes the execution of an encumbrance is in contemplation before the policy issues and that fact is made known to the agent, and sometimes it becomes a matter of negotiation between the agent and the assured after the issuing of the policy. In either event, if the agent in fact consents thereto, such consent is usually held binding on his principal, whether indorsed on the policy or not: *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495; *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 486; *Copeland v. Dwelling-House Ins. Co.*, 77 Mich. 554, 18 Am. St. Rep. 414, 43 N. W. 991; *Bushnell v. Farmers' Mut. Ins. Co.*, 110 Mo. App. 223, 85 S. W. 103; *Hardwick v. State Ins. Co.*, 23 Or. 290, 31 Pac. 656; *Renier v. Dwelling-House Ins. Co.*, 74 Wis. 89, 42 N. W. 208. See ante, subd. IV.

6. **Forbidden Use of the Insured Premises or the Keeping of Forbidden Articles Therein.**—The use of the insured premises for purposes substantially increasing the risk is something which insurers rarely, if ever, consent to without the exacting of additional premium, and the presumption, therefore, is that agents do not have authority to grant such consent, unless the contrary appears. Certainly the mere fact that an agent solicited the insurance and delivered the policy does not warrant the inference that he is authorized to waive the condition therein against keeping gasoline or like inflammable substance or of explosives like gunpowder. Therefore, notice to him after the issuing of a policy, that such prohibited articles are kept, does not affect his principal: *Cassimus v. Scottish Union etc. Ins. Co.*, 135 Ala. 256, 33 South. 163; *Garretson v. Merchants' etc. Ins. Co.*, 81 Iowa, 727, 45 N. W. 1047; *Concordia Fire Ins. Co. v. Johnson*, 4 Kan. 7, 45 Pac. 722; *West End H. & L. Co. v. American Fire Ins. Co.*, 74 Fed. 114. Nor is the principal bound by the fact that such agent told the assured that he might keep such an article, where the policy expressly declared the contrary: *Western Assur. Co. v. Rector*, 85 Ky. 294, 3 S. W. 415.

7. **Additional Insurance.**—Though some conflict of authority upon the subject exists, we think the better view is, that a local or soliciting agent, whose duties consist of negotiating for insurance and delivering policies, is not thereby vested with authority to

consent to the procuring of additional insurance on the property, and therefore, that neither his knowledge of such insurance nor his express consent thereto binds the insurer, in the absence of some evidence showing that the agent had authority to act upon this subject: *Queen Ins. Co. v. Young*, 86 Ala. 424, 11 Am. St. Rep. 51, 5 South. 116; *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 South. 48; *Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 847; *Taylor v. State Ins. Co.*, 98 Iowa, 521, 60 Am. St. Rep. 210, 67 N. W. 577; *Goldin v. Northern Assur. Co.*, 46 Minn. 471, 49 N. W. 246; *Wilson v. Genesee Mut. Ins. Co.*, 14 N. Y. 418; *Commonwealth Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. St. 41; *East Texas Fire Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. 572. Still, there are decisions maintaining the opposite view: *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. 458; *German Ins. Co. v. Rounds*, 35 Neb. 752, 53 N. W. 660; *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209; *Schomer v. Hekla Fire Ins. Co.*, 50 Wis. 575, 7 N. W. 544. Probably if before the policy issues, the agent who negotiated and delivered it is informed of the intention to procure additional or concurrent insurance, a different rule prevails: *Fitchner v. Fidelity M. F. Assn.*, 103 Iowa, 276, 72 N. W. 530; *Independent School Dist. v. Fidelity Ins. Co.*, 113 Iowa, 65, 84 N. W. 956. On the other hand, it has been held that knowledge by an agent that the insured intends to procure additional insurance cannot amount to a waiver, on the ground that the waiver must be subsequent to the written contract, and with knowledge of the other insurance: *United Firemen's etc. Co. v. Thomas*, 82 Fed. 406, 27 C. C. A. 42, 47 L. R. A. 450. Perhaps if a representation is made by an agent as to what will be the effect of taking additional insurance, it may be regarded merely as an opinion on a matter of law, and therefore, is not binding on the insurer under any circumstances: *Union Nat. Bank v. German Ins. Co.*, 84 U. S. 397, 71 Fed. 473, 18 C. C. A. 203. Additional insurance is, however, usually the subject of stipulations in the policy, the effect of which is that persons contemplating, or having already effected, such insurance are led to apply to the local agent for consent thereto, and, upon receiving such application, and perhaps on knowledge otherwise imparted to him, it becomes his duty to take some action on behalf of his principal. Furthermore, the insured, on notifying such agent of the additional insurance naturally, and perhaps rightfully, irrespective of the terms of the policy, expects such agent to take some action, or, at least, to indorse his dissent, if unwilling, as the representative of the insurer, that the original and the additional insurance shall both remain in force. The weight of authority supports the position that the original policy continues in force, though the agent does not make the required indorsement thereon, if he in fact consents to the additional insurance: *Bigelow v. Granite State Fire Ins. Co.*, 94 Me. 39, 46 Atl. 808; *Stauffer v. Pennsylvania Mut. Fire Ins. Assn.*, 164 Pa. St. 199, 30

Atl. 324; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059; ante, subd. IV; contra, *Allemania Fire Ins. Co. v. Hurd*, 37 Mich. 11, 16 Am. Rep. 491; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; *German Ins. Co. v. Heiduk*, 30 Neb. 288, 27 Am. St. Rep. 402, 46 N. W. 481; *Amazon Ins. Co. v. Wall*, 31 Ohio St. 628, 27 Am. Rep. 533. On receiving information of additional insurance, the insurer cannot, without unjustified indifference to the interests of the assured, remain silent, but must either indorse the requisite consent or refuse so to do, and, failing to take any action whatever, is estopped from insisting that the additional insurance has resulted in a forfeiture: *Rathbone v. City Fire Ins. Co.*, 31 Conn. 193; *Phoenix Ins. Co. v. Johnston*, 143 Ill. 106, 32 N. E. 429; *Swedish-American Ins. Co. v. Knutson*, 67 Kan. 71, 100 Am. St. Rep. 382, 72 Pac. 526; *Rauch v. Michigan M. M. Fire Ins. Co.*, 131 Mich. 281, 91 N. W. 160; *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. 889; *Phoenix Ins. Co. v. Holcombe*, 57 Neb. 622, 78 Am. St. Rep. 532, 78 N. W. 300; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 23 Am. St. Rep. 62, 13 S. W. 236; *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253; *West v. Norwich Union Fire Ins. Soc.*, 10 Utah, 442, 37 Pac. 685; *Henschel v. Oregon Fire etc. Ins. Co.*, 4 Wash. 476, 30 Pac. 735, 31 Pac. 332, 765; ante, subd. III.

MIXON v. STATE.

[123 Ga. 581, 51 S. E. 580.]

CRIMINAL TRIAL—*Motion for a New Trial—Excessive Sentence.*—That the court in sentencing the defendant disregarded the recommendation of the jury, and that the sentence is therefore excessive, is not a proper matter for a motion for a new trial. (p. 150.)

CRIMINAL LAW—*Instruction to Jury, Refusal of.*—It is not error to refuse an instruction employed in the head-note of a decision made by the supreme court in another case showing that the charge given in such case by the trial court was erroneous. (pp. 150, 151.)

CRIMINAL LAW—*Instruction as to Excusable Homicide.*—In Georgia, the distinction between excusable and justifiable homicide has been abolished. Hence, on the trial of an indictment for an assault with intent to murder, an instruction may be refused declaring that if the homicide would have been excusable if the shot had killed the man, the shooting at him without killing is also excusable. (p. 151.)

CRIMINAL LAW—*Instruction Regarding the Danger of Punishing Innocent Persons.*—An instruction to the effect that it is a well-established maxim of law that it is better to let a hundred guilty persons go unpunished than to punish one innocent is properly refused. (p. 151.)

CRIMINAL LAW—Character of the Accused.—Where the general character of the accused is not attacked nor put in issue, there is no error in refusing to charge that his character was presumed to be good unless shown to be otherwise. (p. 151.)

CRIMINAL LAW—Instruction that Conviction of One of Two Persons Jointly Indicted Creates No Presumption Against the Other. If the state during the trial of a person accused of crime proves that a person jointly indicted with him has been convicted, it is error to refuse to charge the jury that where several are jointly indicted, the conviction creates no presumption of guilt as to any of the others. (p. 152.)

Indictment of Robert and Andrew Mixon for assault with intent to murder Billy Williams. Robert was first convicted. On the trial of Andrew a bailiff was permitted to testify that Robert had been convicted of doing the shooting. There was an appeal in both cases.

Henry S. Jones, for the plaintiffs in error.

J. S. Reynolds, solicitor general, by John M. Graham, for the defendant.

⁵⁸³ LUMPKIN, J. 1. In the case of Robert Mixon one ground of the motion for a new trial was, that, in view of the recommendation of the jury, the sentence of five years in the penitentiary was excessive. This is not a proper matter for a motion for a new trial.

2. Another ground was that the court refused a request to give in charge the following: "It is not necessary, however, that it appear that it was absolutely necessary to make the assault in order to save life. Therefore when, in a trial for assault with intent to murder, the accused sets up the defense that he inflicted the wounds on the prosecutor to prevent the commission of a felony on his person, and the evidence both of the state and the accused is directed to the truth of the issue thus made, it is error to charge the jury, in effect, that, in order for the accused to be justified it must appear that the danger was so urgent and pressing at the time of the difficulty that in order to save his own life was absolutely necessary to kill." With the exception of the first sentence, this request is a literal copy of the third headnote in the case of *Heard v. State*, 114 Ga. 90, 39 S. E. 909. We, of course, hold that headnote to ⁵⁸⁴ be sound law; but it contains a ruling of this court as to what was an erroneous charge given in the case then under consideration. It is evident that the court in

the present case was not called on to inform the jury that a certain charge was error.

3. The evidence was amply sufficient to support the verdict, and there was no error in overruling the motion for a new trial in the first case.

4. In the case of Andrew Mixon error is assigned because the court refused a written request to give in charge the following: "If the homicide would have been excusable if the shot had killed the man, the shooting at him without killing is also excusable." Under the law of this state the distinction between excusable homicide and justifiable homicide has been abolished: Pen. Code, sec. 70. Every homicide which is without guilt is now classified as justifiable. The use of the word "excusable" in connection with a charge in regard to homicide is therefore inapt in this state, and might tend to cause the jury to believe that a homicide, although not justifiable, was yet excusable. Under the common law this would have been different. The request, in the shape in which it was made, was properly refused.

5. The court was requested to give the following charge: "It is a well-established maxim of law that it is better to let one hundred guilty persons go unpunished than to punish one innocent person." The refusal to do so was assigned as error. The request contains an abstract statement slightly modified from the usual expression that "it is better that ninety-nine guilty men should escape than that one innocent person should suffer": See *Boon v. State*, 1 Ga. 621. Whether or not this is a sound maxim in morals or sociology, it is not a rule of law suitable to be given in charge by a presiding judge to a jury. We have it on tradition that in the early history of the state a request of this character was made, and the judge of the trial court gave it in charge, but added that in his opinion the ninety-nine guilty men had already escaped.

6. Where the general character of the accused was not attacked or put in issue, there was no error in refusing to charge that the character of the accused is presumed to be good unless shown to be otherwise by the evidence.

7. Some of the other requests to charge were covered by the ⁵⁸⁵ general charge. Only one other need be specially noticed. The court refused to charge, on request, that "Where several are jointly indicted, the conviction of

one creates no presumption of guilt as to any of the others." The two defendants were jointly indicted in this case. Robert Mixon was first tried and convicted. If this fact had not appeared or been placed before the jury, it would have been unnecessary to have given any charge on the subject. Nor is it quite clear why counsel for the state saw fit to prove by a witness that Robert had been convicted. As he did so, however, and the two were jointly indicted as principals, and the evidence for the state sought to show that the two were acting in conjunction, the court, on request, should have informed the jury that the conviction of Robert raised no presumption of guilt against Andrew: See *Coxwell v. State*, 66 Ga. 309, 315.

In the case of Robert Mixon the judgment is affirmed; in the case of Andrew Mixon the judgment is reversed.

All the justices concur, except Simmons, C. J., absent.

Instructions in a Criminal Trial that it is better that ninety-nine guilty persons shall escape than that one innocent one shall be punished, and other instructions of similar import, are properly refused: See *Carden v. State*, 84 Ala. 417, 4 South. 823; *Lowe v. State*, 86 Ala. 8, 7 South. 97; *Barnes v. State*, 111 Ala. 56, 20 South. 565; *Seacord v. People*, 121 Ill. 623, 13 N. E. 194; *Coleman v. State*, 111 Ind. 563, 13 N. E. 100; *Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808; *Parish v. State*, 14 Neb. 60, 15 N. W. 357.

When there is No Evidence as to the Character of the accused in a criminal prosecution, it will not be presumed either good or bad. While the law presumes everyone innocent, it does not presume everyone to have a good character: *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662; *Dryman v. State*, 102 Ala. 130, 15 South. 433; *People v. Johnson*, 61 Cal. 142; *Knight v. State*, 70 Ind. 373. But see, however, *Bennett v. State*, 86 Ga. 401, 23 Am. St. Rep. 465.

The Effect of a Sentence in excess of the maximum prescribed by law is considered in the monographic note to *State v. Klock*, 55 Am. St. Rep. 267-274. In some jurisdictions such sentences are void: *Ex parte Cox*, 3 Idaho, 590, 95 Am. St. Rep. 29. But see the note to *Koepke v. Hill*, 87 Am. St. Rep. 194.

BAILEY v. DEVINE.

[123 Ga. 653, 51 S. E. 603.]

CONFLICT OF LAWS.—If a Note has Been Executed and Made Payable in a State, its validity, force, and effect are dependent on the laws of that state. (p. 154.)

LAW OF ANOTHER STATE, Presumption Respecting.—If the law of another state is not pleaded, it will be presumed that the common law is in force there. (p. 154.)

DURESS.—At the Common Law There were Three Kinds of Duress: duress of imprisonment; duress per minas, resulting from fear of loss of life, limb, mayhem, or of imprisonment; and duress of goods. (p. 154.)

DURESS OF IMPRISONMENT is Available as a Defense to a contract if the imprisonment, or threatened imprisonment, was unlawful. (p. 154.)

DURESS.—The Unlawful Imprisonment of One's Child or the threat of such imprisonment may constitute duress. (p. 154.)

DURESS, Note Given by Mother, when Voidable for.—Though one is legally in prison charged with crime, a note obtained from his mother by his counsel on the threat that unless it was given, the trial would be postponed and the accused kept indefinitely in jail, she being far away from home and friends, is obtained by duress and hence not enforceable against her. (p. 155.)

PROMISSORY NOTE, Consideration for, When Insufficient.—A note given by the mother of a person imprisoned on a criminal charge to the latter's attorney, promising to pay him for services previously rendered by another attorney to secure the release from jail of witnesses against the accused, is without consideration. (p. 156.)

Action against Mrs. S. A. Bailey and W. H. Bailey on a promissory note for the sum of five hundred dollars, executed by the defendants in Colorado, and payable to Devine & McAliney. The defendant, Mrs. Bailey, by her answer pleaded that the note was obtained from her by Devine by threats, fraud, and duress; that her son was in jail in Colorado charged with killing a man; that in response to a telegram from him she went to Colorado from her residence in Macon, Georgia; that on arriving, she found her son in jail and spoke to the plaintiff with a view of employing him as an attorney; that he declined to allow the case to proceed to trial until he had been paid a fee, that she agreed on a fee of one thousand dollars, and had this sum telegraphed to her; that after this, Devine informed her that five men had been held in jail by the state as witnesses against the son; that these men had employed Mc-

Aliney to represent them and agreed to pay him five hundred dollars for his services; that they were released from jail, but that they had declined to pay McAliney, and that Devine demanded that she pay the sum due McAliney, and stated that unless it was paid or a note given therefor, he, Devine, would postpone the case and keep the defendant's son indefinitely in jail; that being many miles from home and without friends, and absolutely in the power of Devine and acting under his threat, she gave the note sued upon; that she had nothing to do with McAliney and had not employed him, and gave the note only because made to believe that unless it was given, her son would remain indefinitely in jail. The trial court struck out the defendant's plea and gave judgment against both, and Mrs. Bailey excepted and appealed.

Davis & Miller and J. C. Morcock, for the plaintiff in error.

Hardeman & Jones, for the defendants in error.

655 COBB, J. 1. The note having been executed in Colorado, and being made payable there, its validity, force, and effect are dependent upon the law of that state; and no law of that state being pleaded, it will be presumed that the common law is in force with reference to the defenses set up in the defendant's answer: *Mass. Life Assn. v. Robinson*, 104 Ga. 286, 30 S. E. 918, 42 L. R. A. 261; *Hollis v. Loan Assn.*, 104 Ga. 318, 31 S. E. 215; *Kollock v. Webb*, 113 Ga. 768, 39 S. E. 339; *Akers v. Jefferson Bank*, 120 Ga. 1066, 48 S. E. 424.

2-4. At common law there were three kinds of duress—duress of imprisonment; duress per minas, resulting from fear of loss of life, limb, mayhem, or of imprisonment; and duress of goods: 10 Am. & Eng. Ency. of Law, 2d ed., 321, 322; 9 Cyc. 444, 445. Duress of imprisonment was available as a defense to a contract, if the imprisonment, or threatened imprisonment, was unlawful: See Clark on Contracts, 2d ed., 242 et seq.; Hammon on Contracts, secs. 134, 135, p. 190 et seq. An imprisonment which was originally lawful might, by a subsequent abuse of it, become unlawful and constitute duress: 1 Story on Contracts, 5th ed., sec. 512. An unlawful imprisonment, or threat of unlawful imprisonment, of one's child constituted duress: Clark on Contracts, 2d ed., 245; 10 Am. & Eng. Ency. of

Law, 2d ed., 330; *Southern Express Co. v. Tyson*, 48 Ga. 358. The provisions of our code with reference to duress are broader than the common law. The Civil Code, sec. 3536, provides: "Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will." Section 3670 declares: "The free assent of the parties being essential to a valid contract, duress, either of imprisonment, or by threats, or other arts, by which the free will of the party is restrained, and his consent induced, will void the contract. Legal imprisonment, if not used for illegal purposes, is not duress." It is probable that the provisions of the sections quoted, so far as they relate to duress of imprisonment, ⁶⁵⁶ are no broader than the common law; and it may be that an imprisonment for an illegal purpose would be an unlawful imprisonment within the meaning of the common law. See, in this connection, *Southern Exp. Co. v. Duffey*, 48 Ga. 358, 361; *Hunt v. Hunt*, 94 Ga. 257, 21 S. E. 515; *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931.

Bailey was lawfully in jail in Colorado under a charge of murder, but it was not lawful to keep him in jail indefinitely without a trial. His detention for any other purpose than a trial at the time and in the manner provided by law would be unlawful. The threat of Devine was to bring about an abuse of the lawful imprisonment of Bailey, in order to cause his mother to give the note sued on. Such an act would, even under the strict common-law rule, constitute duress. We can well understand how a woman, ignorant of the law, a thousand miles away from home, relying upon the supposed knowledge of the law and integrity of the plaintiff as an attorney at law, might have thought that he was able to carry his threat into execution, and might therefore have been coerced into a promise to pay the sum sued for, to release her son from the threatened detention in jail without trial. Comment upon the grossly reprehensible conduct of the plaintiff, as shown by the answer, is unnecessary, and would perhaps not be proper, as he has not been heard; but we are clear that the plea of duress was good, and that the court erred in striking it.

5. We are also unable to discover, from the dates pleaded, any valid consideration for the note. The fee of the attorney had been agreed on, and had either been paid to him or was about to be paid. The consideration, therefore, for the note could not have been the performance of services in defense of the defendant's son. Where, then, was the consideration? The witnesses for the state had been released from jail. The plaintiff and McAliney did not undertake to get the witness out of the way; and if they had, the contract would have been void as against public policy: *Rhodes v. Neal*, 64 Ga. 704, 37 Am. Rep. 93. There was no benefit accruing to the defendant by the payment of the fee due by these witnesses to McAliney. She was wholly a stranger to the contract with him for fees. It cannot be said that the promise to bring on the son's trial was the consideration, because the plaintiff had already been paid to represent the son, and certainly his employment comprehended the use ⁶⁵⁷ of such efforts and agencies as he could properly use to bring about the son's speedy trial and release from custody. Besides, a promise to release from an unlawful imprisonment which the promisor himself made unlawful would not afford any valid consideration for a contract to pay for such a service. In any view of the facts set up in the defendant's answer, the plea of no consideration should not have been stricken.

Judgment reversed.

All the justices concur, except Simmons, C. J., absent.

The Law of the Place where a contract is made and to be performed governs its interpretation, validity, and effect: See *Swedish-American Nat. Bank v. First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549, and cases cited in the cross-reference note thereto. A promissory note signed in Massachusetts, but payable in South Dakota, to which state it was sent to the payee by mail, is a South Dakota contract: *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381. See, too, *Bank v. Shaw*, 109 Tenn. 237, 97 Am. St. Rep. 840; *Garrigue v. Keller*, 164 Ind. 679, 108 Am. St. Rep. 324.

The Common Law is Presumed to Prevail in those states which are judicially known to be of common-law origin: *Birmingham Water Works Co. v. Hume*, 121 Ala. 168, 77 Am. St. Rep. 43; *Burdick v. Missouri Pac. Ry. Co.*, 123 Mo. 221, 45 Am. St. Rep. 528; *Pett v. Thatcher*, 112 Ala. 112, 514, 57 Am. St. Rep. 45. It is not presumed to be in force, however, in any state or country where English institutions have not been established: *Banco De Sonora v. Bankers, etc. Casualty Co.*, 124 Iowa, 576, 104 Am. St. Rep. 367.

The Question of Duress will be found discussed at considerable length in the monographic note to *New Orleans etc. Co. v. Louisiana etc.*

Co., 94 Am. St. Rep. 413-420, and the recent case of Foote v. De Poy, 126 Iowa, 366, 106 Am. St. Rep. 365. In Gorringer v. Reed, 23 Utah, 120, 90 Am. St. Rep. 692, it is held that a wife may avoid a contract obtained by threats of imprisoning her husband, and it is of no consequence whether the threat is of lawful or unlawful imprisonment.

CREDILLE v. CREDILLE.

[123 Ga. 673, 51 S. E. 628.]

WILLS—Contest of, Erroneous Reading to Jury of Section of Code.—If a testator by his last will gives his property to one of his sons and the latter's wife and children, it is prejudicial error on the trial of a contest of such will to read to the jury the section of the code declaring that, when a testator bequeaths his entire estate to strangers to the exclusion of his wife and children, his will should be closely scrutinized, and that upon the slightest evidence of aberration of intellect, or collusion, or fraud, or any undue influence or unfair dealing, probate should be refused. (p. 159.)

WILLS, Contest, Burden of Proof.—The burden of proof rests upon the propounders of a will, in the first instance, to show that it was executed, and the capacity of the testator. A prima facie case must be made out, after which the onus is changed, and the burden of proof is on the caveators, to make their grounds of objection good. (p. 160.)

WILLS—Evidence.—Declarations of a Testator to the Effect that He had not Made a Will; that he understood that there was what purported to be a will in G., and that if he had signed any such paper he did not know what he was doing, are admissible, not as evidence of the facts so stated, or of fraud or undue influence, nor of revocation, but as tending to show the state of the testator's mind when the paper purporting to be a will was executed, and whether he then had sufficient capacity to make it, or was in a condition to be easily influenced by others. (pp. 160, 161.)

Petition to set aside the probate of a will.

Samuel H. Sibley and James B. and Noel P. Park, for the plaintiffs in error.

James Davison, for the defendant in error.

FISH, P. J. Reuben A. Credille died September 8, 1902, aged seventy-six years, leaving as his next of kin four sons and two daughters, all of age. On the 10th of October thereafter a paper purporting to be his last will and testament was probated, in common form, by his son, W. Florence Credille, the date of its execution being February 27, 1902. In it the testator gave the bulk of his prop-

erty, consisting of his old homestead of six hundred and fifty acres of land, to this son, his wife and children. He gave nothing to his other children, except to one other son, to whom he bequeathed a feather bed and pillows. W. Florence Credille was named as sole executor in this instrument. Some months after the probate the other three sons and one of the daughters of the testator brought a petition in the court of ordinary, to set aside and cancel this will, against W. Florence Credille, as executor and as an individual, ⁶⁷⁴ and his wife, Mrs. Annie Credille, and their seven minor children, naming them. In the petition it was charged that at the time the alleged will purported to have been executed Reuben A. Credille was paralyzed and was totally lacking in capacity, both mentally and physically, to make and execute a will; that at the date of the paper purporting to be his will he was sick and in bed at the home of W. Florence Credille and entirely under his influence; that if he signed such paper at all, he was moved thereto by undue influence exerted over him by said W. Florence Credille; that if he signed said will, it was not his will, because fraud was practiced upon him by which he was made to believe that he was signing an entirely different instrument, and that the instrument probated was a paper of which the deceased knew nothing; and that this imposition was practiced upon him by W. Florence Credille. W. Florence Credille was appointed guardian ad litem for his children; and the defendants answered, denying the charges of the petition, and alleging that at the date of the will the testator was of sound mind and disposing memory and fully capacitated to make a will, and did make the will in question, uninfluenced by any of the defendants or by any other person, and of his own free will and mind. The case thus made was appealed by consent from the court of ordinary to the superior court, where it was tried, the trial resulting in a verdict and judgment in favor of the caveators and setting aside the will. The defendants moved for a new trial which was refused, and they excepted.

1. Upon the trial the court gave section 3258 of the Civil Code in charge to the jury. That section reads as follows: "A testator, by his will, may make any disposition of his property not inconsistent with the laws or contrary to the policy of the state; he may bequeath his en-

ture estate to strangers, to the exclusion of his wife and children, but in such case the will should be closely scrutinized, and, upon the slightest evidence of aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing, probate should be refused." One ground of the motion for a new trial alleges that the court erred in giving this instruction, the assignment of error being that the facts of the case did not authorize it and that it tended to prejudice the case of the propounders in the minds of the jury. We think a new trial should ⁶⁷⁵ have been granted upon this ground of the motion. The testator did not leave his property to strangers, but to his son, Florence, and his wife and children; and the strict rule, that upon the slightest evidence of aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing, probate of the will should be refused, which is applicable to cases in which a testator leaves his property to strangers, to the exclusion of his wife and children, should not have been given in charge. The contention that if there were error, it was harmless, as the evidence showed that the testator did not leave his property to strangers, and therefore the jury would understand that this rule or principle was not applicable to the case before them, is in conflict with the decision of this court in *Wetter v. Habersham*, 60 Ga. 193. There a testatrix, who left no children or descendants of children, bequeathed the bulk of her property to strangers, and so bequeathed all of it, "if the word 'strangers' be taken to mean any persons not bearing the relationship of husband and wife or children." It was held, that as the heirs at law of the testatrix, who were contesting the will, were her remote or collateral kindred, it was erroneous to give in charge to the jury the latter clause of this section of the code. If it is erroneous to give it in charge in a case in which both the legatees and the kindred excluded by the will stand, relatively to the testatrix, upon the footing of strangers, then it must follow that it is equally erroneous to give it in charge in a case where both the legatees and the kindred excluded stand upon the footing of children. The evidence upon which the will in the present case was set aside by no means demanded such a verdict, and the giving of this erroneous instruction requires the grant of a new trial.

2. Another ground of the motion was, that the court erred in charging as follows: "The burden of proof in the

case rests upon the propounders of the will in the first instance. In the opening of the case the burden of proof is upon Florence Credille to propound the will, and he is here to-day asking that the will be sustained as a valid will. The burden rests upon him to show that the paper was executed, and to show the capacity of the testator." There was no error in this charge. It was in accordance with the decisions of this court in *Evans v. Arnold*, 52 Ga. 169, and *Wetter v. Habersham*, 60 Ga. 193. All that the propounders ⁶⁷⁶ of a will have to do, in a case like this, is to make out a prima facie case, that is, to show the factum of the will and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and, in making it, acted freely and voluntarily; but they must do this much before the onus is shifted to the caveators. In *Thompson v. Davitte*, 59 Ga. 472, 475, Bleckley, J., said: "The truth is, that what the propounders have to carry, on the score of sanity and freedom, is more in the nature of ballast than of cargo. It is just burden enough to sail with—no more." In *Freeman v. Hamilton*, 74 Ga. 317, where the paper propounded as a will was attacked upon grounds similar to those involved in the present case, it was held that while a charge, that "when a paper is presented to the court purporting to be a will, it must be satisfactorily shown to the jury that the person making it had legal capacity to make it; that it was freely and voluntarily made; that it is a fair and legal expression of the intention—the burden of proof is on the person offering it," was correct as far as it went, the court should have gone further and added, that, when the propounder showed the testamentary capacity of the testator, and that the will was made freely and voluntarily, then the onus was changed, and the burden of proof was on the caveators to make their grounds of objection good. In the case under consideration, it appears, from the charge of the court contained in the record, that the instruction complained of was carefully qualified in accordance with the decision just above cited.

3. The motion for a new trial also complained of the admission in evidence of various declarations made by the testator after the date when the paper purporting to be his will appears to have been executed. One of these declarations was to the effect that he had not made a will;

two others were that he never made a will in his life, and the other was that he understood there was what was supposed to be a will he had made in Greensboro, and he wanted the person to whom the declaration was made to bear witness, if he [the testator] had signed such a paper, he didn't know anything about what he was doing. These declarations were admissible, not as evidence of the facts which they purported to declare, nor as evidence that any fraud was practiced upon the testator, or any undue influence exercised over him, nor as evidence of a revocation of any will that he might have made, but as ⁶⁷⁷ tending to show the state of his mind when the paper purporting to be his will was executed and whether he then had sufficient capacity to make a will, or was then in such a mental condition as to be easily and unduly influenced by another: *Dennis v. Weekes*, 51 Ga. 24; *Mallery v. Young*, 94 Ga. 804, 22 S. E. 142. The court very carefully and fully instructed the jury as to the purpose for which these declarations were admissible, and the purposes for which they were not admissible, and plainly told them that such declarations could not be considered as evidence to show that the paper was not executed, or that fraud and undue influence were practiced upon the testator, or for the purpose of revoking the will, and that these declarations were no proof of the facts stated therein. There was no error in admitting them for the purpose to which the court limited their consideration by the jury.

The other grounds of the motion are the general ones and grounds of the same nature, complaining that the verdict was contrary to various quoted extracts from the charge of the court.

Judgment reversed.

All the justices concur, except Simmons, C. J., absent.

When a Will is Contested on the ground of want of testamentary capacity and of undue influence, the burden of proof, according to *Maddox v. Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734, is on the proponents to prove the proper execution of the will and also the mental competency of the testator; when these facts are shown, it devolves on the contestants to prove fraud or undue influence. See, further, *Bacon v. Bacon*, 181 Mass. 18, 92 Am. St. Rep. 397; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352. That a presumption of testamentary capacity is indulged, and that the burden of proof is upon the contestant of a will to show incapacity, see *Eastis v. Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227; *Kaufman*

v. Caughman, 49 S. C. 159, 61 Am. St. Rep. 808. As to the presumption of undue influence, see Dausman v. Rankin, 189 Mo. 677, post, p. 391, and cases cited in the cross-reference note thereto.

Declarations by a Testator to impeach his will are discussed in Fleming v. Morrison, 187 Mass. 120, 105 Am. St. Rep. 386; In re Kaufman, 117 Cal. 288, 59 Am. St. Rep. 179; Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265; Swope v. Donnelly, 190 Pa. St. 417, 70 Am. St. Rep. 637; note to Roberts v. Trawick, 52 Am. Dec. 167-169.

SYLVANIA v. HILTON.

[123 Ga. 754, 51 S. E. 744.]

MUNICIPAL ORDINANCES—Evidence as to Construction of. If a building ordinance, or an ordinance prescribing fire limits, is not clear, but is of ambiguous or doubtful meaning, it is competent to show what has been the ordinary construction placed on it by the municipal authorities. (p. 164.)

MUNICIPAL ORDINANCES—Construction of.—An ordinance declaring that all buildings within the fire limits shall be constructed of brick, stone, or other incombustible substance or material, and covered with tin or metallic or fire-proof roofing, is not susceptible of the construction that a building may be constructed of combustible material if covered with corrugated iron. (p. 166.)

MUNICIPAL ORDINANCES, Evidence to Aid Construction of, When Inadmissible.—If an ordinance requires buildings within the fire limits to be of "incombustible" material, this word is not so ambiguous in meaning as to justify the admission of evidence to the effect that the ordinance has been by the municipal authorities construed as permitting the erection of buildings of combustible material, provided they were covered with corrugated iron. (pp. 167, 168.)

MUNICIPAL ORDINANCES, Strict Construction of Penal Provisions.—Where an ordinance provides for the punishment of any person who erects, or attempts to erect, any wooden building in violation of its provisions, the ordinance must be strictly construed, and does not warrant the punishment of one who erects a building, otherwise wooden, but covered at the sides with corrugated iron. (p. 168.)

AN INJUNCTION will not Issue to Stop a Criminal Prosecution if the complainant can assert his rights by way of defense to such prosecution. (pp. 168, 169.)

Petition of Hilton against the mayor and council and marshal of the city of Sylvania. He alleged that in January, 1897, an ordinance was passed purporting to prescribe the fire limits of the town and to prevent the erection of wooden buildings. Sections 2 to 5 of such ordinance were as follows:

"Sec. 2. Be it further ordained, that all buildings hereafter to be erected within said fire limits on said lots and closed street shall be constructed of brick, stone, or other incombustible substance or material, and covered with tin or metallic or fireproof roofing. Provided, it shall and may be lawful to repair any wooden building now erected on said lots or closed streets, or to build any barn, stable, or other outbuilding under any sheltered or covered roof now standing, with the permit of the mayor.

"Sec. 3. Be it further ordained, that no wooden building shall be erected on the lots adjacent to said fire limits, except by special permit of the mayor, who shall examine the locality upon which it is sought to erect said wooden building, and determine whether the erection thereof will endanger other buildings near by.

"Sec. 4. Any person erecting or attempting to erect any wooden building in violation of this ordinance shall be punished by a fine not less than five dollars, nor more than fifty dollars, and imprisoned not more than thirty days, in the discretion of the mayor, and for the second offense said parties shall be fined not less than ten dollars, nor more than one hundred dollars, and imprisoned not more than thirty days.

"Sec. 5. Be it further ordained, that any building erected in violation of this ordinance shall be deemed a nuisance; and if the party erecting or causing same to be erected, or who erected the same, shall fail or refuse to have the same, removed after being duly notified, the mayor shall cause the same to be removed by the marshal at the expense of such party."

He further alleged that the purpose of this ordinance was to require buildings within the fire limits if constructed of wooden material, to be covered on the outside with some incombustible material, such as tin or iron, and that such had been the construction of the ordinance from its passage to until a few days prior to the filing of the petition, and that some of the members of the city council were themselves preparing to so construct such buildings. That the building which the petitioner was erecting was intended to be used as a restaurant and had been leased to a colored woman, and that such leasing had met with the disapproval of the mayor and council and was their sole reason for denying to applicant the right to

erect the building. The petition also showed various proceedings of the municipal authorities looking toward the prevention of the erection of the building, and also to plaintiff's punishment for having erected it. The prayer was that the defendants be enjoined from tearing down, or interfering with, the erection of, the building or from enforcing the prosecution of the complainant for a violation of the ordinance. The trial judge granted the injunction, and the defendants appealed.

H. S. White, for the plaintiff in error.

E. K. Overstreet, for the defendants in error.

⁷⁵⁶ LUMPKIN, J. Some of the evidence introduced by both sides was incompetent, such as statements that "it was the understanding of deponent, and he thought that it was the understanding of other members of council," etc.; and ⁷⁵⁹ that "said ordinance meant," etc. The substantial question, however, is whether the ordinance was so clear and unambiguous as not to require the aid of extrinsic evidence for its construction, or whether resort could be had to evidence that other buildings had been erected similar in character to this one, without objection on the part of the municipal authorities, for the purpose of throwing light on the meaning of the language used. If an ordinance is plain, clear, and unambiguous, it needs no aid from parol evidence for its proper construction. In such event the mere fact that it has been violated several times or many times would afford no excuse or reason for another violation, nor would it confer any right on others to violate it. To illustrate, if an ordinance prohibited the shooting of firearms within the corporate limits, upon the trial of one who violated it the fact that others had committed a like breach of the ordinance and had gone unpunished would furnish no defense to him. So it is also in regard to a state law. It would be no defense to one tried for larceny to show that many other larcenies had been committed and the criminals had escaped without prosecution or punishment, although known. If, however, a building ordinance, or an ordinance prescribing fire limits is not clear, but is of ambiguous or doubtful meaning, it is competent to show what has been the ordinary construction placed upon it by the municipal authorities, in order to arrive at a proper construction of it: 1 Dillon

on Municipal Corporations, 4th ed., sec. 93; 1 Smith's Municipal Corporations, secs. 540, 541; McQuillin on Municipal Ordinances, secs. 73, 289, 290; State v. Severance, 49 Mo. 401; Cole v. Skrainka, 105 Mo. 303, 16 S. W. 491; Saunders v. Nashua, 69 N. H. 492, 43 Atl. 620. In McQuillin on Municipal Ordinances, section 292, it is said: "The general rule is that the meaning of an ordinance must be gathered from the law itself, and not from contemporaneous statements of the individuals who framed it or those who voted for it. This rule is particularly enforced where the provisions of the ordinance are clear. In such case, contemporaneous construction adopted by the municipal officers charged with its enforcement will be held inadmissible to aid its construction. However, in doubtful cases where the language of the ordinance is ambiguous, a contemporaneous construction adopted by the parties interested in the enforcement of the ordinance, while not controlling, is entitled to great weight": See, also, Tiedeman on Municipal ⁷⁰⁰ Corporations, sec. 159. The rule is similar in construing statutes: Brown v. United States, 113 U. S. 568, 5 Sup. Ct. Rep. 648, 28 L. ed. 1079; Sherwin v. Bugbee, 16 Vt. 444; Frazier v. Warfield, 13 Md. 279. So, if the terms of a contract are clear and unambiguous, they cannot be changed by proof of usage: Kimball v. Brawner, 47 Mo. 398. The question then is, Within which of these rules does the ordinance under consideration fall? It is clear that the construction sought to be put upon it by the plaintiff cannot stand. The expression, "and covered with tin or metallic or fireproof roofing," plainly refers to the roof of the building, not to its sides. Certainly it cannot be contended that the municipal council intended to provide for a building to be covered all over with roofing, whether tin, metallic, or fireproof. Roofing means the materials for a roof, and it needs no argument to show that this ordinance did not mean to provide for covering the sides of the house with materials for the roof.

The only question remaining, then, necessary for a construction of this part of the ordinance, is whether the word "incombustible" is ambiguous so as to allow it to be construed by parol evidence showing that other houses had been built similar in character to that of the plaintiff. The Century Dictionary defines the word to mean "not combustible; incapable of being burned or consumed by

fire.” In *Payne v. Wright* (1892), L. R. 1 Q. B. Div. 104, the meaning of the word was under consideration. The metropolitan building act provided that the roof of every building should be covered externally with “slates, tiles, metal, or other incombustible materials.” The roof of a building was covered externally with materials consisting of woven iron wire coated with an oleaginous compound. The coating would ignite and burn away, leaving the wire work uninjured. It was held that the roof was not covered with “incombustible materials” within the meaning of the act. Mathew, J., said: “The findings of the magistrate seem, however, themselves to answer the question put to us, for he finds as a fact that the material was partly combustible and partly incombustible. Upon these findings how is it possible for us to say that, as a matter of law, this material was incombustible within the meaning of the act? It is true that the magistrate finds that this material is, for some reasons, safer than glass, but that does not make it incombustible.” A. L. Smith, J., said: “Section 19 provides that the roof of ⁷⁶¹ every building shall be covered with slates, tiles, metals, or other incombustible materials. Does that mean ‘other materials’ which are wholly incombustible, or materials which are partly combustible and partly incombustible? In my opinion it means materials wholly incombustible.” The evidence in the present case shows without controversy that the entire framework of the house is of wood, and that it is to be covered on the outside with thin plates of corrugated iron. There is no contention that wood is incombustible, so that the material of which the entire framework of the house is built is combustible, and only a part of the material used, being the outer coating or covering, is incombustible in character. There are also other parts of the building composed of wood, such as the floor, ceiling, etc. Thus the case cited is directly in point. In *Badley v. Cuckfield Union Rural Dist. Com.*, 72 L. T., N. S. (Q. B. D. 1895), 775, the following rule was made: “One of the by-laws made by the defendants, as rural sanitary authority, required all new buildings to be ‘inclosed with walls constructed with good bricks, stone, or other hard and incombustible materials properly bonded,’ etc. The plaintiff proposed to erect a sanatorium for his school, consisting of corrugated sheets of galvanized iron one thirty-second of an inch in thick-

ness, with a layer of felt inside, fixed to the outside of a framework of wooden upright and horizontal posts and rails, with wooden match-boarding inside. Held, that the galvanized iron alone was not a wall, and that the structure combined of wood and iron which constituted the wall was not of hard and incombustible materials as required by the by-law." Lord Russell, C. J., in the opinion, said: "I think, therefore, for the purposes of this case we must regard the wall as consisting of at least the wooden post and frame and the sheets of corrugated iron. Can that be called a wall of incombustible material? I think decidedly not; and the case is made stronger if we include the felt and the match-boarding."

In *Ward v. Murphysboro*, 77 Ill. App. 549, an ordinance was under consideration which declared it unlawful for any person, company, corporation, or firm to erect, build, or commence the erection, within the fire limits of the city, of any wooden or frame building or structure exceeding a certain size. Certain persons erected within such limits a building have a wooden ⁷⁶² frame structure, one side, the ends, and the roof of which were covered with wooden sheeting, and this was covered with corrugated iron, the spaces between the studding being filled with loose brick. As the building was nearing completion, the mayor, marshal, and aldermen of the city, without giving notice to remove the building, tore it down, for which the owners brought suit in trespass. The defendants pleaded in justification the ordinance referred to. The trial court declined, on request, to charge the jury, "The court further instructs you that the plaintiffs had a right to show by evidence, if they can, the fact, if such appears to be a fact from the evidence, that the city has permitted similar buildings to be erected and constructed, within the fire limits of Murphysboro, as the one alleged to have been torn down by defendants, for the purpose of showing the construction the city and its officers themselves place upon said ordinance as to what buildings it prohibited." On this point the appellate court ruled as follows: "If the city officers had tacitly allowed that portion of the city included in the fire limits to be filled with frame buildings no better than tinder boxes, such fact would have thrown no light upon the true construction of the fire ordinance. When the ordinance was duly passed and published, it

became a law of the city, and the city officers had no more right to disobey the law or suspend it, enlarge or construe it away, than any other person": See, also, *Tuttle v. State*, 4 Conn. 68, 70. It has been said: "Where a municipal corporation has power to prohibit the construction of wooden buildings within a district and has enacted an ordinance to that effect, it may remove any building erected in violation of the ordinance, and this, too, without any judicial proceedings whatever": 13 Am. & Eng. Ency. of Law, 2d ed., 400, and notes. As to the general powers of this municipality see Political Code, section 696. In *Stewart v. Commonwealth*, 10 Watts, 306, it was said: "On an indictment charging the defendant with erecting a wooden building within the city of Pittsburg, contrary to the ordinance, the jury found that he had erected a building composed partly of brick and partly of wood. Held, that such building was not within the ordinance." This decision, however, was made in a criminal case, where the rule of construction applicable to criminal laws applied. In the opinion Sergeant, J., said: "If this ⁷⁶³ were a remedial law, it might be construed liberally, so as to effectuate the design of the legislature, which was to guard against the danger of fires in a populous city. But being a penal statute, and this proceeding of a criminal cast, the rule of law is well settled, that such statutes are to be construed strictly, and that no one is to be brought within the penalty of the act who is not within the plain meaning of the words, strictly construed; and they are confined to wooden buildings only." The ordinance now under consideration only provides for punishment by fine and imprisonment if any person shall erect or attempt to erect "any wooden building in violation of this ordinance." A building of the character of that described in the evidence is not, strictly speaking, a wooden building, although, as held above, it is not constructed of incombustible material within the meaning of the ordinance. So far as the criminal proceeding is concerned, therefore, it is not sustainable under the ordinance. But it was not proper to grant an injunction to stop the prosecution, inasmuch as the plaintiff can assert all his rights by way of defense.

That part of the ordinance which provides for notifying the owner to remove the building, and, on his failure or refusal to do so, that the mayor shall cause its removal,

is not confined to a wooden building strictly so called, but applies to "any building erected in violation of this ordinance." Under the law we are of the opinion that the presiding judge erred in granting the injunction.

Judgment reversed.

All the justices concur, except Simmons, C. J., absent.

Building Regulations are discussed in the monographic note to *Bostock v. Sams*, 93 Am. St. Rep. 405-411, and in the subsequent case of *Tenement House Department v. Moeschen*, 179 N. Y. 325, 103 Am. St. Rep. 910.

LAMAR v. LAMAR.

[123 Ga. 827, 51 S. E. 768.]

THE WRIT OF NE EXEAT may be Granted at the Instance of a Wife Against Her Husband pending an application for alimony and prior to a decree therefor. (p. 171.)

Suit by Mrs. Lamar against her husband for permanent alimony. She made an application for temporary alimony and for a writ of ne exeat, claiming that her husband was preparing and threatening to leave the state to avoid supporting her and her minor children. The writ issued as prayed for. On motion to dismiss, it was refused, and the defendant excepted.

Winfield Jones, for the plaintiff in error.

S. C. Crane, for the defendant in error.

828 LUMPKIN, J. Under the English practice the writ of ne exeat regno was a prerogative writ which issued to prevent a person from leaving the realm. In America it has been treated, not as a prerogative writ, but as a writ of right in the cases in which it is properly grantable. In regard to alimony the practice of granting the writ has sometimes been said to have arisen from compassion, and because the ecclesiastical courts could not take bail. But the truer ground on which equitable interference arose would seem to be, that although alimony was not strictly an equitable debt, yet the ecclesiastical courts were unable to furnish a complete remedy to enforce the duty of payment thereof; and therefore courts

of equity ought to interfere to prevent the decree from being defeated by fraud: 2 Story's Equity Jurisprudence, 13th ed., secs. 1465, 1469, 1471, 1472. As to whether the writ will be issued in cases of alimony until after alimony has been decreed, there has been some diversity of opinion. In New York, where the jurisdiction as to divorce and alimony was vested in the court of chancery, it was held by Chancellor Kent that he would pendente lite grant the writ of ne exeat republica against the husband upon proper application: *Denton v. Denton*, 1 Johns. Ch. 364, 441. On the other hand, in Michigan, it was held that this would not be done: *Bailey v. Cadwell*, 51 Mich. 217, 16 N. W. 381. In 1813 an act of the legislature was passed in this state, which, among other things, declared that: "The judges of the superior courts shall, and they are hereby authorized to grant writs of ne exeat, as well in cases where the debt or demand is not actually due, but exists fairly and bona fide in expectancy at the time of making application, as in cases where the demand is due": Cobb's Digest, 525. In *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 40, it was held: "A writ of ne exeat may be granted in this state prior to any decree for alimony. The court, in marking the writ, will exercise a sound discretion, under the special circumstances of the case—having due regard to the rank of the parties and the property of the husband, so as to prevent oppression or extortion." This decision cited approvingly, and to a considerable extent followed, the decision of Chancellor Kent in *Denton v. Denton*, 1 Johns. Ch. 364, 441; so that this court, at an early date, appears to have adopted this view rather than that since announced by the supreme court of Michigan. The fact that the amount of alimony ^{\$20} had not been fixed by decree was not considered an insuperable objection, as the court could use a sound discretion in fixing the bond or "marking the writ."

In *McGehee v. Polk*, 24 Ga. 406, 411, it was said: "In bills for account and administration of assets, no certain balance need be sworn to to entitle the complainants to the writ of ne exeat. It is sufficient if there is a clear affidavit of assets received." When the laws of this state were first codified in 1863, the grounds for the writ were stated in section 3147. It declared that "The writ of ne exeat issues to restrain a person from leaving the jurisdiction of the state, and may be granted in the following cases: 1. At the instance of a creditor whose debt is not due, or where, from some other cause, the ordinary

process is not available or sufficient against his debtor, or against a third person secondarily or otherwise under any circumstances chargeable with the debt"; after which follow several other grounds for the issuance of the writ. Subsection 1, just quoted, was carried forward into the Code of 1868, where it formed a part of section 3159. In the Code of 1873 the grounds for the issuance of the writ are stated in section 3226. In that section item 1 of section 3159 of the previous code was omitted by the codifiers, on the ground that by the constitution of 1868 (article 1, paragraph 18) it was declared that there should be no imprisonment for debt. And this constitutional declaration has been continued in the constitution of 1877 (article 1, section 21). This provision unquestionably prevents imprisonment for a mere ordinary debt, and the writ of *ne exeat* cannot be used for that purpose. But alimony does not rank as a mere debt. A husband can be directed to pay alimony, and for a failure or refusal to comply with the order he may be imprisoned; and this has been held not to conflict with the constitutional provision above cited: *Carlton v. Carlton*, 44 Ga. 216; *Lewis v. Lewis*, 80 Ga. 706, 12 Am. St. Rep. 281, 6 S. E. 918. The striking of the first item of this section of the Code of 1863, referring to the writ of *ne exeat*, did not have the effect to restore the English rule that the claim must be due or reduced to judgment, if the case were one where the writ was properly grantable, and if that rule applied to alimony.

The question involved in the present case, however, is not left dependent upon reasoning or construction, but is practically decided ⁸³⁰ in the case of *Gibson v. Patterson*, 75 Ga. 549, where it was said: "Where a bill was filed in aid of a libel for divorce, and the principal purpose of it was to secure the wife's alimony, with proper allegations and proof, the chancellor would have authority to order the arrest of the defendant, and to require him to give bond and security for his compliance with any order that he might grant in the divorce case then pending, for the payment of alimony to his wife." In 1870 an act was passed which authorized a suit for alimony in cases where the husband and wife were living separately or were in a bona fide state of separation, and no action for divorce was pending. The proceeding provided for in this act was an equitable one, and authorized the judge to grant such order as he might grant if the application were based on a pending libel for divorce, "to be enforced in the

same manner, together with any other remedy applicable in a court of equity": Acts 1870, p. 413; Civ. Code, sec. 2467. An application for temporary alimony under this section is to be based on an application for permanent alimony: *Yeomans v. Yeomans*, 77 Ga. 124, 3 S. E. 354. The rulings in regard to alimony pending divorce, and the issuing of a writ of ne exeat apply as well to this case as to one where an application for divorce is pending.

Judgment affirmed.

All the justices concur, except Simmons, C. J., absent.

In the Recent Case of Bronk v. State, 43 Fla. 461, 99 Am. St. Rep. 119, it is held that where a court of chancery has been given jurisdiction of suits for divorce and alimony and maintenance, and is vested with authority to make such orders as may be necessary to secure to the wife such maintenance, it may issue a writ of ne exeat before any decree or order fixing the amount of alimony or maintenance has been made, in all cases where it seems to the chancellor just and necessary to take such a course.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

**ANABLE v. BOARD OF COMMISSIONERS OF THE
COUNTY OF MONTGOMERY.**

[34 Ind. App. 72, 71 N. E. 272.]

HEALTH BOARD—Powers.—An act done by a board of health, by virtue of statutory authority has, within the board's jurisdiction, the force of an act of the legislature, the whole authority of the state being included and delegated. (p. 175.)

HEALTH BOARD—Powers—Invasion of Private Rights.—While the act of a board of health is generally legislative, and not subject to review by the courts, yet personal and property rights cannot be arbitrarily stricken down by such board under the guise of the police power, and if such rights are thus invaded, the act is subject to review by the courts. (p. 175.)

HEALTH—Nuisance—Pesthouse.—The erection of a pesthouse as a public necessity is legal, and not a nuisance per se. A right of action may arise if such house is negligently or wrongfully conducted. (p. 176.)

HEALTH BOARD—Powers—Taking of Private Property—Pesthouse.—If a board of health provides for the erection of a pesthouse, and such erection destroys the value of private property and amounts to a taking thereof, such act cannot be permitted to stand, unless shown to have been expressly authorized. The distinction must be kept in view between the exercise of the police power whereby private property, contaminated with a dangerous disease is summarily destroyed, and that whereby private property, itself not dangerous to the public, is directly injured. The latter act cannot be legally done. (p. 176.)

HEALTH BOARD—Pesthouse—Exercise of Police Power—Taking Private Property.—If a private person's property has been injured or destroyed by the act of a board of health in erecting a pesthouse, it is no defense that such act was done in the exercise of the police power for the preservation of the public health. To constitute a defense to such act, a proper exercise of the police power must be shown, and in determining the question, regard must be had to the locality of such pesthouse, the present necessities of the particular case, and all other pertinent facts and circumstances. (pp. 176, 177.)

POLICE POWER—Presumption.—If the state directs some specific act to be done in the exercise of the police power, which

without authorization would constitute a private nuisance, but does not specifically direct how such act shall be done, it will not be presumed, in the absence of public necessity, that the state has exercised such power so as to injure private property. (p. 177.)

HEALTH BOARD—Erection of Pesthouse—Justification.—If a board of health pleads statutory sanction in justification of an act generally constituting a nuisance to private property, such as the erection of a pesthouse, it must show either that the act is expressly authorized by the statute, or that it is plainly and necessarily implied from the powers expressly conferred. (p. 177.)

G. D. Hurley and H. D. Vancleave, for the appellant.

B. Crane, C. M. McCabe and I. C. Dwiggin, for the appellee.

⁷³ ROBINSON, J. Suit by appellant for damages because of the location and maintenance of a pesthouse near his land. ⁷⁴ The complaint, to which a demurrer was sustained, avers that appellant owns about ten acres of land, described, just north of the city limits of Crawfordsville, in a populous district, and that the adjacent land is built up and used for residences; that appellant's land is susceptible of being platted and sold for suburban home sites, and for that purpose was on January 11, 1901, worth two thousand dollars, and for all other purposes seventeen hundred and fifty dollars; that on the above date the county owned a poor-farm of one hundred and forty acres, lying north and east of appellant's land, and for a long time prior thereto had maintained on the north line thereof a county pesthouse for the detention and treatment of smallpox patients, and as thus located did not in any way interfere with the value of appellant's land for building sites; that on the above date appellee, in lawful session, wrongfully ordered, of record, the secretary of the board of health to remove the pesthouse to the southwest corner of the poor-farm, on land abutting appellant's land, and ordered the secretary to build extensions thereto, and do such other things as were necessary for the arrest of an epidemic of smallpox then prevailing in the county; that pursuant to such order the secretary moved the same, built additions thereto, and erected water-closets adjacent thereto within ten feet of appellant's land; that upon completion of the same appellee wrongfully confined therein a large number of persons afflicted with smallpox, and wrongfully burned and buried on the premises clothing of persons so afflicted, and deposited dangerous excretions from patients in the vaults adjacent to appellant's land; that by reason of

these wrongful acts and the wrongful removal and permanent maintenance of the pesthouse as above stated, and the treatment of smallpox patients therein, the value of appellant's land has been and is totally destroyed for platting for home sites and for all other purposes, and the enjoyment of the same by appellant is destroyed; that appellant's only place of ingress and egress to and from his land is by passing within ten feet of such pesthouse; that the same is offensive ⁷⁵ to the sight, dangerous to appellant's premises, an obstruction to the free use of appellant's property, a nuisance, and totally destroys the value of appellant's land for any purpose whatever.

1. Appellee, constituting a board of health ex officio for the county, is charged with the duty "to protect the public health by the removal of causes of diseases when known, and in all cases to take prompt action to arrest the spread of contagious diseases": Burns' Rev. Stats. 1894, sec. 6718; Acts 1891, sec. 8, p. 15. The legislature has not attempted to designate the means that shall be employed, nor the manner in which the powers may be exercised, by the board in preventing the spread of contagious diseases, but has left these matters to the health board's discretion within the authority conferred. An act done by the board by virtue of statutory authority has, within the board's jurisdiction, the force of an act of the legislature. Within the scope of the power granted, the whole authority of the state is included and delegated: See *Swindell v. State*, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50; *City of Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650.

2. And while it is true that an act done by a municipality for the protection of the public health presents, generally, a legislative question not subject to review by the courts, yet, as said in *Blue v. Beach*, 155 Ind. 121, 131, 80 Am. St. Rep. 195, 56 N. E. 89, 50 L. R. A. 64: "Such measures or means must have some relation to the end in view, for, under the mere guise of the police power, personal rights and those pertaining to private property will not be permitted to be arbitrarily invaded by the legislative department; and consequently its determination, under such circumstances, is not final, but is open to review by the courts": See *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

3. If appellee's right to locate the pesthouse where it has located it is absolute, the pesthouse is not a nuisance per ⁷⁶ se,

nor would the placing of persons therein afflicted with small-pox be wrongful. A pesthouse is a public necessity. It is authorized by law. Its erection being legal it could not be a nuisance per se. A right of action might arise if such a house were negligently or wrongfully conducted (*Haag v. Board of Commrs.*, 60 Ind. 511, 28 Am. Rep. 654), but the pleading does not present this question. It is averred, among other things, that appellant's property, suitable for residences, and in a populous locality, has been rendered worthless, and that the only place of ingress and egress to and from his land is by passing within ten feet of the pesthouse. It is quite true that the distinction must be kept in view between the exercise of the police power and the exercise of the right of eminent domain—that in the latter case actual compensation must be made to the owner for property taken or injured, and in the former the injury is either *damnum absque injuria*, or the owner is considered compensated by sharing in the general benefits resulting from the exercise of the power. However, more important than this distinction is the constitutional guaranty that no man's property shall be taken by law without just compensation. And it must be conceded that the exercise of a power which destroys property, or its value, or takes away any of its essential attributes, deprives the owner of such property. So that if a municipality, in the exercise of the police power, should do an act which renders the property of an individual worthless, and which would be, in effect, a taking of the property, such act should not be permitted to stand except upon a showing that the act as done was most clearly and unequivocally authorized. And the distinction must be kept in view between an exercise of the police power whereby private property contaminated with a dangerous disease is summarily destroyed, and private property, itself not dangerous to the public, is directly injured. The immediate danger⁷⁷ to the public health which justifies the exercise of the power in the former case does not exist in the latter.

4. It is not a sufficient answer to a person whose property has been injured or destroyed to say simply that the act complained of was done in the exercise of the police power for the preservation of the public health. It cannot be said, no matter how comprehensive the power, that a municipality might locate a pesthouse in the midst of a thickly settled neighborhood, or that the power to erect a pesthouse carries

with it the further power to locate it at a place where it will injure others. The infliction of an injury upon another is not necessarily the natural result of the erection of a pesthouse, nor is it an inevitable consequence of an exercise of the power to erect and maintain it. The right to do the particular act does not essentially carry the right to do it so as to inflict injury upon an innocent individual. The citizen does not hold his property subject to the exercise of the police power by the state or municipalities to which it has been delegated, but he holds it subject to the proper exercise of such power. And in determining whether there has been a proper or an unwarranted exercise of discretion in locating a pesthouse at a particular place, regard must be had to the location itself, the present necessities of the particular case, and other pertinent facts and circumstances.

5. Moreover, if it be conceded that the state might direct some particular specific act to be done in a specified manner, which would necessarily, under any condition, result in the creation of what would be, without such authorization, a private nuisance, yet in the absence of specific legislative direction as to the manner in which the act should be done, it should not be assumed that the state, public necessity not requiring it, would so exercise the power as to injure the property of an individual.

6. It must be noted that the statute simply makes it the duty of the board "in all cases to take prompt action ⁷⁸ to arrest the spread of contagious diseases." The board is not required by the statute to erect and maintain a pesthouse. The discretion committed to the board is not limited to determining the location of a pesthouse, but it also involves the duty of determining whether it shall be built at all. That is, if the board erects a pesthouse, it does so under authority necessarily implied from the powers expressly conferred. And if the board pleads statutory sanction in justification of an act which the general rules of law constitute a nuisance to private property, it should show either that the act is expressly authorized by the statute, or that it is plainly and necessarily implied from the powers expressly conferred. "Where rights are infringed," said Chief Justice Marshall in *United States v. Fisher*, 2 Cranch, 358, 390, 2 L. ed. 304, "where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to in-

duce a court of justice to suppose a design to effect such objects."

In *Hill v. Managers, etc.*, [1879] 4 Q. B. Div. 433, 6 App. Cas. 193, suit was brought for damages and for an injunction to restrain the use of a smallpox hospital erected near the premises of the plaintiff, on the ground that it was a nuisance. The defendants justified under the act of parliament which authorized the erection of asylums for the sick, and referred to smallpox patients as among the class of persons to be provided for. Upon the trial the hospital was found to be a nuisance, and upon appeal the judgment was affirmed. Among the opinions pronounced in the house of lords was one by Lord Watson, in which he said: "I do not think that the legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the ⁷⁹ case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the legislature lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights. If the order of the legislature cannot be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to show that the legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose": See, also, *Truman v. London etc.*

R. Co., 25 Ch. Div. 423; Hooker v. New Haven etc. Co., 14 Conn. 146, 36 Am. Dec. 477; Coggsell v. New York etc. R. Co., 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; Hill v. Mayor etc., 139 N. Y. 495, 34 N. E. 1090; Mayor etc. v. Fairfield Imp. Co., 87 Md. 352, 67 Am. St. Rep. 344, 39 Atl. 1081, 40 L. R. A. 494; Baltimore etc. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739.

⁸⁰ We think the complaint sufficient to require appellee to answer.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

The Location of a Pesthouse by a city near a farm and the residence thereon has been held an injury and a taking of property for which compensation must be made: Paducah v. Allen, 111 Ky. 361, 98 Am. St. Rep. 422. See, also, Baltimore v. Fairfield Imp. Co., 87 Md. 352, 67 Am. St. Rep. 344; note to Markham v. Brown, 92 Am. Dec. 76-80. But according to Frazer v. Chicago, 186 Ill. 480, 78 Am. St. Rep. 296, a city may establish a smallpox hospital on its own property without violating the constitutional guaranty that private property shall not be damaged for public use without just compensation, and that no action for damages will therefore lie for injury to property in the neighborhood, if the hospital is rightfully located and well conducted. A similar ruling is made in the case of a prison building in Long v. Elberton, 109 Ga. 28, 77 Am. St. Rep. 363. As to the liability of a city for the spread of disease from its pesthouse, see Henderson v. O'Halloran, 114 Ky. 186, 102 Am. St. Rep. 279; note to Missouri etc. Ry. Co. v. Wood, 93 Am. St. Rep. 849.

CITY OF FRANKFORT v. IRVIN.

[34 Ind. App. 280, 72 N. E. 652.]

HEALTH BOARD—Powers—Employment of Nurse.—A board of health having authority to take prompt action in all cases to arrest the spread of contagious or infectious diseases, has power to employ nurses to attend persons afflicted with such diseases, and the salary for the services of such nurses is a proper charge against the municipality. (p. 181.)

HEALTH BOARD—Powers—Employment of Nurse Through Committee.—A city board of health, in the employment of a nurse to attend persons afflicted with contagious disease, acts in a ministerial capacity; and if it acts through the agency of a committee or other person authorized, the act is no less binding than if done by the board or the city itself. (pp. 181, 182.)

HEALTH—Contagious Diseases—Expense of Preventing Spread of.—The fact that it is the duty of the overseer of the poor and not of the city proper, to make provision for the indigent poor, does not relieve the city from liability for necessary nursing expenses

incurred by it in preventing the spread of a contagious or infectious disease. (p. 182.)

HEALTH—Contagious Disease—Expenses of Burial.—A city may legally contract to pay for the services of a person who assists in the burial of one who has died from the effect of a contagious disease while under the control and charge of the city board of health. (p. 182.)

L. D. Baldwin and Brumbaugh & Curtis, for the appellant.

J. T. Hockman, W. S. Christian and A. H. Boulden, for the appellee.

²⁸¹ **ROBINSON, P. J.** Suit by appellee for services in nursing and caring for smallpox patients confined in a pest-house, also for services in removing certain persons afflicted with the disease to the pesthouse, and for services rendered in burying certain persons who had died of the disease, such persons, it is averred, being in indigent circumstances and without money or property. The services are claimed to have been rendered under the employment and direction of the common council of appellant, acting as a board of health, appellant city not having created a separate board of health, Appellee had judgment. Counsel for appellant in their argument have not questioned either of the two paragraphs of complaint, but have discussed only the motion for a new trial.

The statute (Burns' Rev. Stats. 1901, sec. 6718; Acts 1899, sec. 8, p. 17) makes the mayor and common council of an incorporated city, not having a board of health by statute or ordinance, a board of health for the city, and makes it the duty of such board "to protect the public health by the removal of causes of diseases when known, and in all cases to take prompt action to arrest the spread of contagious and infectious diseases, to abate and remove nuisance dangerous to the public health, as directed or approved by the state board of health and perform such other duties as may from time to time be required of them by the state board of health pertaining to the health of the public." The statute makes it a further duty of the board to "elect a secretary who shall be the health officer of the appointing board." The statute ²⁸² also confers upon city health officers the statutory and common-law powers of constables in all matters pertaining to the public health.

1. It is first argued that the evidence fails to make the case as averred by appellee in his complaint. But we think the record contains evidence from which it can be said that

there was some danger of an epidemic of smallpox in the city, and at a special meeting of the common council, called to consider the situation, a special committee was appointed, consisting of three councilmen, one of whom was designated as chairman, and to this committee was referred the matter of looking after the smallpox in the city. It appears that soon afterward there were a number of cases of smallpox in the city, and that most of the acts done with reference thereto were done by the chairman of this committee, and that it was through this chairman appellee was employed. It does not appear that this chairman did anything that the city council, acting as a board of health, might not have done itself. It does not appear what authority was given this committee, or its chairman, in the matter, but it does appear that appellant ratified a part of the work of this committee by afterward paying bills contracted in relation to the management of the pesthouse. It was as a nurse in this pesthouse that appellant was employed through the chairman of this committee. We think it appears from the evidence that what this committee and its chairman did was one entire transaction, which should be repudiated or ratified as a whole.

2. The statute makes it the duty of the board of health to take prompt action in all cases to arrest the spread of contagious and infectious diseases. It is left to the discretion of the board as to how this may best be done. What power the board has, as against the individual, to confine a person afflicted with smallpox in a pesthouse, we have nothing to do with in this case. The board took such measures as it thought best to protect the health of the people ²⁸³ at large, and is liable for such expenses as are properly attributable to measures taken for the prevention of the spread of the disease: *Board of Commrs. v. Fertich*, 18 Ind. App. 1, 46 N. E. 699. And we think it can be said that the employment of a nurse to care for a person afflicted with smallpox is an essential precautionary measure to prevent the spread of the disease: *Monroe v. Bluffton*, 31 Ind. App. 269, 67 N. E. 711.

3. Under the circumstances disclosed by the record, appellant, acting as a board of health, could have legally contracted with appellee for his services as a nurse. The making of such a contract would not be in the exercise of either a quasi judicial or of a legislative character, but would be in the performance of a ministerial duty. Such a contract made through the agency of a committee or other authorized person

is no less binding than if made by the city itself: *City of Logansport v. Dykeman*, 116 Ind. 15. The extent of the authority of the person or persons empowered to act in such a case must necessarily depend to a large extent upon the conditions existing in the particular case.

4. As is well said in *Blue v. Beach*, 155 Ind. 121, 80 Am. St. Rep. 195, 56 N. E. 89, 50 L. R. A. 64: "Among all of the objects sought to be secured by governmental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the state, through its proper instrumentalities or agencies, to take all necessary steps to promote this object." It is quite true that a person dealing with an agent of a municipality must take notice of the limit of his powers, and must know whether the authority assumed is within the law. But the record in this case contains some evidence that appellee was employed to perform the services, for which he sues, by an agent of appellant who had authority to make the employment. It is immaterial that the pesthouse was located outside the city limits. The maintenance of the pesthouse, and ²⁸⁴ the care of such citizens of appellant as it caused to be removed thereto, were a part of the plan adopted to control the disease and prevent its spread in the city. The fact that it is the duty of the overseer of the poor, and not the duty of the city, to make provision for poor and indigent persons, does not relieve the city from liability for necessary expenses incurred by it in preventing the spread of the disease: *Board of Commrs. v. Fertilich*, 18 Ind. App. 1, 46 N. E. 699.

5. Nor does it prevent the city from legally contracting to pay the services of a person who assists in the burial of a person who has died of the disease while under the control and charge of the city's health board. A rule of the state board of health makes it the duty of any person having charge of the remains of one who has died of smallpox to cause the body to be interred within twelve hours after death. The statute makes it the duty of local health boards to promulgate and enforce all rules and regulations of the state board of health: See *Blue v. Beach*, 155 Ind. 221, 80 Am. St. Rep. 195, 56 N. E. 89, 50 L. R. A. 64. The proper and prompt burial of a person who has died of smallpox may be as necessary in preventing the spread of the disease as the proper care of a person while afflicted with the disease.

Judgment affirmed.

Powers Which may be Delegated to Boards of Health are discussed at length in the monographic note to *Blue v. Beach*, 80 Am. St. Rep. 212-234. And quarantine and health laws and regulations are discussed in the extended note to *Hurst v. Warner*, 47 Am. St. Rep. 533-552.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY v. QUILLEN.

[34 Ind. App. 330, 72 N. E. 661.]

RAILROADS—Discharge of Surplus Water.—A railroad company has no right to collect surplus water on its right of way, though properly acquired, and discharge it in a body on the lands of an adjoining owner. Such damages as result from such discharge of water are not included in the price paid for the right of way. (p. 186.)

PLEADINGS—Nuisance—Damages.—If a complaint shows that an alleged nuisance might be abated, and that there was no threat nor purpose to continue it, such facts do not render the complaint bad, but go to the question of damages. (p. 187.)

RAILROADS—Discharge of Surplus Water.—A railroad company has the right to lower the grade of its tracks, and to dig ditches to convey water off its right of way, but not to turn it upon the lands of an adjoining owner. That the act of constructing the ditches was lawful and was performed with care makes no difference. (p. 187.)

RAILROADS—Rights Over Right of Way.—The grant of a right of way to a railroad does not carry the right to go beyond its limits. The owner is not compensated by an assessment of damages for the right of way for wrongful acts after the acceptance of a deed or the making of an appropriation. (p. 187.)

RAILROADS—Discharge of Surface Water.—If the owner of lands collects surface water in a body, he is bound to provide a means of discharge by drainage and if he fails to do so the owner of lower lands has a cause of action. This rule is as applicable to railroad companies as to individuals. (p. 188.)

NUISANCE—Permanent—Burden of Proof.—If the only damage done to a complainant's land from a discharge of surface water is upon the occasion of a heavy fall of rain, and he sues for damages for permanent injury, the burden is upon him to prove that such rainfall caused him injury of a permanent character. (p. 188.)

NUISANCE—Continuance of Wrong—Presumption.—If the cause of injury is of such nature as to be abatable by the expenditure of labor or money, the law will not presume a continuance of the wrong. (p. 189.)

NUISANCE—Permanent—Measure of Damages.—If a railroad company in cutting ditches on its right of way throws barren earth on the lands of an adjoining owner, such injury is of a permanent character, and the measure of damages is the difference in the value of the land before and after such injury. (p. 189.)

NUISANCE—Flooding Lands—Measure of Damages.—The collection of surface water and its discharge upon the land of another is a temporary nuisance and abatable, and its continuance will not be presumed. The measure of damages for such act is the difference in the rental value of the land before and after the injury. (p. 189.)

W. R. and C. G. Gardiner, T. D. Slimp, and E. Barton, for the appellants.

W. A. Cullop, G. W. Shaw, A. J. Padgett and A. Padgett, for the appellee.

⁸³¹ COMSTOCK, C. J. This action was commenced in the Knox, and on change of venue was tried in the Daviess, circuit ⁸³² court. There were two trials. Upon the first the jury disagreed; upon the second they gave a verdict in favor of appellee against all of the appellants for eleven hundred and eighty-five dollars.

The complaint is in two paragraphs. The material allegations of the first are that plaintiff is the owner of about two hundred acres of rich and valuable land for farming and residence purposes in location 132 in Steen township, Knox county, Indiana; that prior to the grievances complained of said land was high and free from ponds, pools, etc.; that rainfall and surface waters and natural streams flowed from, instead of upon, said land; that during the months of May and June, 1900, the defendants were engaged in building a railroad, and in doing so made excavations and fills on, along and across her land, and thereby covered two acres of the same with waste, and destroyed the same, and that said two acres were of the value of forty dollars each; that "defendants wrongfully made fills and cut ditches so as to prevent water flowing therefrom, and to lead surface waters and natural streams, which prior thereto flowed away, to flow thereon, and to create pools of standing water, without means of escape, on her said land, and thereby and on account thereof to destroy by said means forty acres of her said land"; that said forty acres were, prior to said grievances, worth forty dollars per acre, but because of said grievances are now wholly worthless; and because of the wrongs of said defendant she has been damaged one thousand dollars.

The second paragraph alleges, in substance, that the plaintiff is, and has been for five years, the owner of two hundred acres of land in location 132 in Steen township, Knox county, Indiana, lying along defendants' railroad track; that defend-

ants were about to change the position, location and grade of said railroad track, and, in doing so, placed on two acres of said land barren clay, which has destroyed the fertility of said two acres, and made it useless; that defendants have cut ditches and made embankments which will and have run onto forty acres of land large quantities ³³³ of water, which, on account of natural drainage, would run away from said land, and have and will thereby create large standing pools, which will and have become stagnant, give off odors, create a nuisance, and will and have destroyed forty acres of her land; that she has been damaged thereby in the sum of nineteen hundred dollars.

A demurrer for want of facts to each paragraph was overruled. Defendant filed an amended answer in three paragraphs, the first being a general denial. The second paragraph gives the date (1857) of the construction of the Ohio and Mississippi Railroad to the ownership of which the defendant the Baltimore and Ohio Southwestern succeeded; recites the source of title of its right of way; avers facts to the effect that the acts, of which plaintiff complains, were necessary in the operation and maintenance of its said road, and were done in an orderly and careful manner, all of which were done by the defendants, Waddle & Fitch, as contractors with said railroad company. The third paragraph is the same as the second, except that it gives a different source of title. A separate and several demurrer for want of facts to each of said second and third paragraphs of answer was sustained. The cause was tried upon the issues joined on the complaint and general denial.

The appellants, the Baltimore and Ohio Southwestern and Waddle & Fitch, each assigned as errors the action of the court in overruling the demurrer of said appellants to the first and second paragraphs of the amended complaint, respectively, and in overruling the motions for a new trial.

As to the first paragraph of the complaint, the position of appellants is, that while it proceeds upon the theory that appellants were engaged in the construction of a railroad over appellee's land, and by so doing created a nuisance thereon causing consequential damages thereto, yet it contains no averment of facts to justify the conclusion that the appellant railroad company had not, by proper proceeding, acquired the right to construct the railroad, or that the ³³⁴ construction was wrongful; that it contains no averment that the

appellee had not been fully compensated for consequential damages; that the averments show that the alleged nuisance might be abated, and, as a consequence, the value of the land restored; that there is no averment of a threat or purpose on the part of appellant to continue the conditions described, or of any damage other than the entire destruction of the value of part of the lands of the appellee; that there is no description of the lands alleged to have been rendered of no value.

1. Without separately taking up each of these objections, we think the paragraph is sufficient upon the ground that it charges that appellants "wrongfully made fills and cut ditches so as to prevent water flowing therefrom, and to lead surface water and natural streams, which prior thereto flowed away, to flow thereon, and to create pools of standing water, without means of escape on her said land, and thereby and on account thereof to destroy by said means forty acres of her said land, thereby creating a permanent nuisance." The acts charged are properly characterized as tortious injury to appellee's real estate, and not negligence. In the face of the averment that the acts complained of were wrongful, there could be no presumption that appellant had by proper proceeding acquired the right to commit the acts of which appellee complains, nor would the presumption arise that consequential damages had been fully compensated. The appellant railroad company would have no right to collect surplus water on its right of way, and discharge it in a body on the lands of appellee, to her injury. If the right of way had been properly acquired, plaintiff's right to be compensated for damages from water thereafter collected and discharged upon her land would not be affected. Such damages are not included in the price paid for the right of way: *Egbert v. Lake Shore etc. R. Co.*, 6 Ind. App. 350, 33 N. E. 659; *Stodghill v. Chicago etc. R. Co.*, 43 Iowa, 26, 22 Am. Rep. 835 211; *Hunt v. Iowa Cent. R. Co.*, 86 Iowa, 15, 41 Am. St. Rep. 473, 52 N. W. 668; *Louisville etc. R. Co. v. Hays*, 11 Lea, 382, 47 Am. Rep. 291; *White v. Chicago etc. R. Co.*, 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257.

2. Conceding that the averments show that the alleged nuisance might be abated, and that there is no threat or purpose on the part of appellants to continue the conditions described, these are facts going to the measure of damages ap-

pellee would be entitled to recover for injuries already sustained.

3. The land is sufficiently described to withstand a demurrer: *Shipler v. Isenhower*, 27 Ind. 36.

During the trial appellee's title seems not to have been questioned. It is agreed by the parties, as appears of record, that the plaintiff holds her title to the real estate described in the complaint as a remote grantor from the same party from which the defendant the Baltimore and Ohio Southwestern Railroad Company holds its title to the right of way. In the absence of a motion for a more particular description, and with the foregoing agreement, it is too late to question the sufficiency of the description. What we have said applies to both paragraphs of the complaint. The theory of each is that the injury to the plaintiff's land was caused by the deposit of barren and waste earth upon appellee's land and the collecting and discharge of surface water by means of ditches dug by the defendants. In each paragraph it is alleged that the railroad company is a corporation duly organized and existing by virtue of the laws of the state of Indiana, and that the defendants Waddle and Fitch are partners doing business under the name and style of Waddle & Fitch, and all of said defendants are engaged in committing the wrongs complained of.

4. The purport of the second and third paragraphs of answer is that the appellant railroad company had the right to make necessary drains and ditches, collect water therein²³⁸ and discharge it upon the lands of plaintiff. They show the theory of the defense. They do not show a right to inflict a consequential or direct injury to plaintiff's property without compensation. The appellant railroad company had the right to lower the grade of its tracks, and to dig ditches to convey water off its right of way, but not to turn it upon the lands of plaintiff. That the acts of constructing the ditches were lawful and were performed with care would make no difference: *Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. Rep. 568, 25 N. E. 876.

5. The grant of a right of way does not carry the right to go beyond its limits, and the owner is not compensated by an assessment of damages for a right of way for wrongful acts after the acceptance of a deed or the making of an appropriation: *Egbert v. Lake Shore etc. R. Co.*, 6 Ind. App. 350, 33 N. E. 659; *Evansville etc. R. Co. v. Dick*, 9 Ind. 433.

The case of *Cleveland etc. R. Co. v. Huddleston*, 21 Ind. App. 621, 69 Am. St. Rep. 385, 52 N. E. 1008, cited by appellant, is distinguishable from the case at bar. The right to build a railroad includes the subsidiary right to make changes necessary for the proper construction and maintenance of the same. That question is not the controlling one in this case. "The principle upon which all the decisions proceed is that if the owner of lands collects surface water into a body, he is bound to provide a means of discharge by drainage, and that if he fails to do so, the owner of the lower lands has a cause of action": 24 Am. & Eng. Ency. of Law, note on pages 930, 931; *Cairo etc. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Patoka Tp. v. Hopkins*, 131 Ind. 142, 31 Am. St. Rep. 417, 30 N. E. 896; *City of Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Davis v. City of Crawfordsville*, 119 Ind. 1, 12 Am. St. Rep. 361, 21 N. E. 449; *Kelly v. Pittsburgh etc. R. Co.*, 28 Ind. App. 457, 91 Am. St. Rep. 134, 63 N. E. 233. The rule applicable to a railroad company and an individual is the same. A railroad company has no right to gather surface water on its land or right of way into ditches and ³³⁷ drains, and discharge it in a body on the lower lands of other persons, to their injury: 24 Am. & Eng. Ency. of Law, p. 953, and cases cited in note 4.

It is contended that the damages assessed are excessive. The evidence shows without conflict that all of the land covered with waste dirt beyond the line of the right of way, assuming the right of way to be but eighty feet, did not exceed seven feet in width and one thousand feet in length (about one-half acre), and that the land was worth not to exceed fifty-five dollars per acre. It is also claimed that the court erred in the admission of evidence and in the giving of certain instructions.

6. The damage from water was sustained only upon the occasion of heavy falls of rain. The theory of the complaint is for permanent injury. Plaintiff thus assumed the burden of establishing the existence of facts showing that the encroachments were of a permanent character. If the evidence fails to show injury of such a character, the theory of the complaint is not supported, and the verdict is contrary to the law: *Louisville etc. R. Co. v. Renicker*, 8 Ind. App. 404, 35 N. E. 1047; *Cleveland etc. R. Co. v. Dugan*, 18 Ind. App. 435, 48 N. E. 238; *Equitable Acc. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623. A nuisance which may be discontinued is not

a permanent one. The law will not presume the continuance of a wrong: *Cleveland etc. R. Co. v. King*, 23 Ind. App. 573, 55 N. E. 875; *Uline v. New York etc. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536; *Cleveland etc. R. Co. v. Kline*, 29 Ind. App. 390, 63 N. E. 483.

When the injury is caused by a trespass upon the plaintiff's land, since the defendant cannot remedy the wrong without another trespass, the remedy is not continuous, but inflicted once for all, and full compensation is recovered by one action: *Sedgwick on Damages*, 8th ed., sec. 92; *Sutherland on Damages*, 3d ed., sec. 1042; *Cumberland etc. Corp. v. Hitchings*, 65 Me. 140.

7. The true rule deducible from the authorities is that when the cause of injury is of such nature as to be abatable by the expenditure of labor or money, the law will not presume the continuance of the wrong: *Railroad Co. v. Higdon*, 111 Tenn. 121, 76 S. W. 895; *Nashville v. Comar*, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465.

8. In *Cleveland etc. R. Co. v. King*, 23 Ind. App. 513, 55 N. E. 875, many illustrative cases are collected. From the consideration of them, and many more, we think that it may fairly be said that, where damages have been allowed for prospective injuries, the nuisance was deemed to be permanent, although the courts have differed as to what was permanent or temporary injury. The deposit of barren earth, with its attendant results, may, under the decisions, be regarded as a permanent injury. As to such averment, there is evidence tending to support the finding. As to that part of appellee's claim, the measure of damages would be the diminution in the value of the land.

9. The collection and discharge of water in a body upon appellee's land it is alleged is temporary, because it is abatable, and its continuance will not be presumed, and the damage occasioned thereby should be determined by another rule, namely, the difference in the rental value of the land before and after the injury. "Thus, in an action for flowing land or in polluting water, compensation can only be had for loss accruing before the date of the writ": *Sedgwick on Damages*, 8th ed., sec. 91.

Plaintiff was permitted to prove the difference between the value of her entire tract of land before and after the acts complained of. The question of the admissibility of such evi-

dence was not reserved. That question is not, therefore, presented.

The court gave of its own motion the following instruction: "If you find for the plaintiff, you will assess her damages at such sum as the evidence may show her land has been damaged. The measure of damages, if any, would be ³³⁹ the difference in the value of the land immediately before and immediately after the commission of the injuries complained of, if any." To the giving of this instruction appellants duly excepted. The instruction was erroneous, as not being applicable to the entire injury complained of, not making any distinction in the character of the injuries.

For this reason the judgment is reversed. The consideration of other alleged errors is not deemed necessary, as they may not arise upon a second trial. The trial court is directed to sustain appellants' motion for a new trial.

A Land Owner has No Right to Collect Surface Water in artificial channels and discharge it in large quantities upon the land of a neighboring owner to his damage: *Noyes v. Cosselman*, 29 Wash. 635, 92 Am. St. Rep. 937. See the discussion of this question, in the case of railway companies as well as other land proprietors, in the monographic note to *Mizell v. McGowan*, 85 Am. St. Rep. 715-725.

ACME FERTILIZER COMPANY, v. STATE.

[34 Ind. App. 346, 72 N. E. 1037.]

NUISANCE—Public.—Anything which is an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life and property by an entire community or neighborhood, or any considerable number of persons is a public nuisance. (p. 192.)

NUISANCE—Private and Public.—Whatever is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life or property is a nuisance. If the injury is limited to an individual, it is private; if it affects the public it is public and the subject of a public prosecution. (p. 192.)

NUISANCE—Public.—Corporations may be prosecuted by indictment or information for erecting, continuing or maintaining a public nuisance. (p. 193.)

NUISANCE—Mixed.—There is a class of acts properly denominated mixed nuisances, being both private and public in their effects. They are public in that they produce injury to many persons or all the public, and private because at the same time they

produce a particular injury to private rights, which subjects the wrongdoer to indictment by the public and to damages at the suit of the person or persons injured. (p. 193.)

NUISANCE—Mixed—Private Right of Action.—If the nuisance charged is a mixed one, the right to maintain a private action depends upon proof of a special injury different in kind from, and additional to, that suffered by the general public. (p. 193.)

NUISANCE—Public.—An information charging the erection and maintenance of a building for the manufacture of products from the bodies of dead animals and the carrying on of the business of manufacturing products from the bodies of dead animals, is sufficient to show that such building was used or maintained for the exercise of a trade, employment or business which might constitute a public nuisance. (p. 194.)

CORPORATIONS—Criminal Charge Against—Burden of Proof. On the trial of an indictment alleging that the defendant is a corporation, the prosecution has the burden of proof to show that fact. (p. 194.)

L. C. Embree and L. Benson, for the appellant.

C. W. Miller, attorney general, C. C. Hadley, L. G. Rothschild and W. C. Geake, for the state.

³⁴⁷ **ROBY, J.** This is an appeal from a judgment of the Gibson circuit court imposing a fine of one hundred dollars and the costs of the suit upon the appellant for maintaining a nuisance in the operation of a factory for the manufacture of products of merchandise from the bodies of dead animals. The prosecution was upon affidavit and information. The information was in three counts. Motions to quash were sustained as to the first count, and overruled as to the second and third. The appellant was found guilty upon the third count.

The first question for decision arises upon the action of the court in overruling the motion to quash the third count. So far as essential to the decision it was as follows: "That the Acme Fertilizer Company, a corporation, on the tenth day of February, 1903, and at divers other times since said day, at Gibson county, state of Indiana, did unlawfully erect, continue, use and maintain a public nuisance, to the injury of many of the citizens of the state of Indiana, by erecting and maintaining near the dwelling-houses and homes of divers citizens of said county a building known as the Acme Fertilizer Plant, situate on the following described real estate in Gibson county, in the state of Indiana, ³⁴⁸ to wit: [specific description omitted] in and about which building the said Acme Fertilizer Company did manufacture products from the

bodies of dead animals, and at the same times and place aforesaid the said Acme Fertilizer Company did carry on, and cause and procure to be carried on, the business of manufacturing products from the bodies of dead animals then and there by it collected, and did then and there and thereby wrongfully and unlawfully create and suffer to escape from said building, into the open air, divers noisome, offensive, unwholesome and poisonous smells, so that the air for a great distance in every direction about said building was thereby impregnated with said smells, and rendered noisome, offensive, unwholesome and noxious, and injurious to the health, comfort and property of many of the citizens of the state of Indiana residing in the neighborhood of said building, and where the air was so impregnated with said smells as aforesaid."

1. If the acts charged amount to a public nuisance, the information was sufficient. "Anything which is 'an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life and property by an entire community or neighborhood, or any considerable number of persons,' is a public nuisance": State v. Ohio Oil Co., 150 Ind. 21, 37, 49 N. E. 809, 47 L. R. A. 627. "A nuisance is literally an annoyance, and signifies in law such a use of property or such a course of conduct as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom": 21 Am. & Eng. Ency. of Law, 2d ed., p. 682.

2. "Our statute, perhaps, gives as accurate a definition of the term 'nuisance,' as understood at common law, as can be found elsewhere: 'Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property': 2 G. & H., sec. 628, p. 288; Burns' Rev. Stats. 1901, sec. 290; Rev. Stats. 1881, sec. 289. If the injury were limited to an individual, it gave a private right of action; if it affected the public, it was the subject of a public prosecution": State v. Taylor, 29 Ind. 517. "Every person who shall erect, or continue and maintain, any public nuisance, to the injury of any part of the citizens of this state, shall be fined not exceeding one hundred dollars": Burns' Rev. Stats. 1901, sec. 2153; Rev. Stats.

1881, sec. 2065. "Corporations may be prosecuted by indictment or information, for erecting, continuing or maintaining a public nuisance": Burns' Rev. Stats. 1901, sec. 1970; Rev. Stats. 1881, sec. 1897; *State v. Sullivan County Agr. Soc.*, 14 Ind. App. 369, 42 N. E. 963; *Paragon Paper Co. v. State*, 19 Ind. App. 314, 49 N. E. 600.

3. A standard text-writer, after defining public nuisances strictly as those resulting from the violation of public rights, and producing no special injury to one more than another of the people, and private nuisances as injuries resulting from the violation of private rights, producing damages to but one or a few persons, as in the building of a house with the eaves projecting over the land of another, says: "There is a class of acts which may properly be denominated mixed nuisances, being both public and private in their effects; public in that they produce injury to many persons or all the public; and private because at the same time they produce a special and particular injury to private rights, which subjects the wrongdoer to indictment by the public and to damages at the suit of persons injured. Of this class are establishments which, by reason of the nature of the business carried on, produce such noxious smells and vapors as to annoy the whole community, and at the same time are a special injury to those residing or doing business in their immediate vicinity, by rendering their houses untenable, or their enjoyment so uncomfortable that they sustain a special and particular damage apart ³⁵⁰ from and beyond the rest of the public": Wood on Nuisances, 3d ed., secs. 14-16; *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 577, 37 L. R. A. 497.

Appellant's contention is that there are no facts stated in the information showing other than individual injury to natural persons in respect to their private enjoyment of their homes and property; that any one of such persons could have maintained a civil action, but that no injury to anyone in his capacity as a part of the public is shown. If the nuisance charged is a mixed one, as above defined, the right to maintain a private action would depend upon proof of a special injury different in kind from, and additional to, that suffered by the general public: *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813.

4. The charge is that appellant "did unlawfully erect, continue, use and maintain a public nuisance, to the injury of many of the citizens of the state of Indiana, by erecting and

maintaining near the dwelling-houses and homes of divers citizens of said county, and did wrongfully and unlawfully create and suffer to escape from said building, into the open air, divers noisome, offensive, unwholesome and poisonous smells, so that the air for a great distance was thereby impregnated with said smells, and rendered noisome and injurious to the health, comfort and property of many citizens of the state of Indiana residing in the neighborhood of said building." The facts thus stated are sufficient to show that the public was affected by the acts complained of: *Dennis v. State*, 91 Ind. 291; *State v. Ohio Oil Co.*, 150 Ind. 21-37, 49 N. E. 809, 47 L. R. A. 627; *State v. Weil*, 89 Ind. 286.

It is contended that section 2154 of Burns' Revised Statutes 1901 (Rev. Stats. 1881, sec. 2026), defines the form of a public nuisance that arises in the maintenance of any building for the exercise of any trade, employment or business, which, by occasioning noxious exhalations or noisome and offensive smells, becomes ³⁵¹ injurious to the health, comfort or property of individuals or the public; that the definition includes every element necessary to create a nuisance at common law, and specifically adds elements not necessary at common law; and that a prosecution for a nuisance thus created will not lie, except under section 2154, *supra*.

The objection to the information—assuming that the offense is defined by section 2154, *supra*—is that there is no averment that the building was erected, continued, used or maintained for the exercise of any trade, employment or business, and that such averment is an essential element of the definition given in section 2154, *supra*. The information is not subject to the criticism. To charge the erection and maintenance of a building for the manufacture of products from the bodies of dead animals, and the carrying on of the business of manufacturing products from the bodies of dead animals, is sufficient to show that such building was used or maintained "for the exercise of any trade, employment or business." An expression contained in the brief filed on behalf of the state, which is relied upon as admitting the insufficiency of the indictment under section 2154, *supra*, was evidently made through inadvertence. If the offense charged in the information under consideration is not within the definition contained in section 2154, *supra*, the sufficiency of the facts stated to constitute a nuisance must be determined by a reference to

the definition of that term, which, as has been before stated, is not substantially different at common law from the definition contained in the Civil Code. Thus measured, the facts stated are sufficient to constitute a nuisance. Therefore, there was no error in overruling the motion to quash the third count of the information.

5. The burden was on the state to prove that the defendant was a corporation: Burns' Rev. Stats. 1901, sec. 1970; Rev. Stats. 1881, sec. 1897. The allegation that appellant was a corporation was a part of the description of the offense: *Paragon Paper Co. v. State*, 19 Ind. App. 314, 49 N. E. 600. There was ³⁵² evidence from which the inference that appellant was a duly organized corporation was deducible.

The argument made as to the sufficiency of the evidence to support the finding generally, and as to the admissibility of the testimony, is ineffective, in view of the construction given to the information herein.

Judgment affirmed.

Comstock, C. J., concurs in the result, but dissents from any expression in the opinion which would seem to recognize common-law offenses in this state.

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I. Scope of Note.

In this note we shall consider only the substantive law on the question as to what constitutes a public nuisance. Hence, we shall not consider the question of remedies to abate or enjoin public nuisances nor criminal prosecutions for the maintenance of such nuisances. In this connection, see the note on the enjoining of nuisances, attached to *Crighton v. Dahmer*, 35 Am. St. Rep. 670; the note on the liability of cities for injuries from nuisances, attached to *Chalkley v. City of Richmond*, 29 Am. St. Rep. 737; the note on remedies for the obstruction of navigable waters, attached to *South Carolina Steamboat Co. v. Wilmington etc. R. Co.*, 57 Am. St. Rep. 693; the note on the liability of a property owner for a public nuisance which he did not create, attached to *Leahan v. Cochran*, 86 Am. St. Rep. 521; and the note on the statute of limitations in actions for nuisances, attached to *St. Louis etc. Ry. Co. v. Biggs*,

20 Am. St. Rep. 176. Nor shall we consider, except incidentally, the constitutionality of ordinances or statutes declaring certain acts to be nuisances. The question of debris as a public nuisance was discussed in the note to *Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 551; while the right of a private person to occupy or obstruct public streets was considered in the note to *Callanan v. Gilman*, 1 Am. St. Rep. 840; and the question whether municipal corporations have any greater right than individuals to pollute waters was the subject of the note to *Winchell v. Waukesha*, 84 Am. St. Rep. 908.

II. General Nature of Nuisances and Public Nuisances.

a. At Common Law.—Addison, in his work on Torts, section 370, says: "The term nuisance, derived from the French word 'nuire,' to do hurt or to annoy, is applied in the English law to infringements upon proprietary rights which interfere with their comfortable enjoyment, but do not amount to a disseisin either actual or implied."

In a general way, a nuisance is defined as anything that worketh hurt, inconvenience, or damage: *Baldwin v. Ensign*, 49 Conn. 113, 44 Am. Rep. 205; *Hoadley v. Seward*, 71 Conn. 640, 42 Atl. 997; *Coker v. Berge*, 9 Ga. 425, 54 Am. Dec. 347; *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *State v. Haines*, 30 Me. 65; *Veazie v. Dwinel*, 50 Me. 479; *Norcross v. Thoma*, 51 Me. 503, 81 Am. Dec. 588; *Ellis v. Kansas City etc. R. Co.*, 63 Mo. 131, 21 Am. Rep. 436; *Kansas City v. McAleer*, 31 Mo. App. 433; *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790; *Meeker v. Van Benschelaer*, 15 Wend. 397; *Ellis v. Academy of Music*, 120 Pa. St. 608, 6 Am. St. Rep. 739, 14 Atl. 450; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665; *State v. Carpenter*, 68 Wis. 165, 60 Am. St. Rep. 843, 31 N. W. 730; *Mohr v. Gault*, 10 Wis. 513, 78 Am. Dec. 687; *United States v. Debs*, 64 Fed. 724. In *Burnham v. Hotchkiss*, 14 Conn. 311, the court, after referring to the definition given above, said: "A common nuisance is that which worketh such hurt to the citizens at large."

But nuisances are injuries to the public or to others, and not injuries or annoyances which a person causes to himself or his own family: *State v. Hord*, 122 N. C. 1092, 65 Am. St. Rep. 743, 29 S. E. 952. In *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 593, 37 L. R. A. 497, the court, in determining whether the storing of gunpowder was a public nuisance, said: "At common law 'a public nuisance signified anything that worketh hurt, inconvenience or damage to the king's subjects': 1 Russell on Crimes, sec. 317; 3 Blackstone's Commentaries, sec. 216; 2 Bouvier's Institutes, 503; 2 Bouvier's Law Dictionary, 248; 2 Hawkins' Pleas of the Crown; *Ferguson v. Selma*, 43 Ala. 398."

There must, however, be a material annoyance, inconvenience, discomfort, or hurt, and violation of the rights of another in an

essential degree in order to constitute either a public or private nuisance: *Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123, 46 N. W. 128, 8 L. R. A. 808.

In *People v. Toynbee*, 20 Barb. 168, 200, the court, quoting from 4 Blackstone's Commentaries, 166, said: "Common or public nuisances are offenses 'against the public' order or economical regimen of the state, being either the doing of a thing to the annoyance of the king's subjects or the neglecting to do a thing which the common good requires''"; and continuing, the New York court observed that, "The true test is, that the thing, trade, or business is in some way detrimental to the public, for the elementary writers say 'common nuisances are such inconvenient or troublesome offenses as annoy the whole community in general, and not some particular person''": See *State v. Godwinsville etc. Road Co.*, 49 N. J. L. 266, 60 Am. Rep. 611, 10 Atl. 666, 668; *Doolittle v. Broome County*, 16 How. Pr. 512; *Veazie v. Dwinel*, 50 Me. 479; *Cardington v. Frederick*, 46 Ohio St. 442, 21 N. E. 766; *United States v. Debs*, 64 Fed. 724; *Kuhn v. Illinois Central R. Co.*, 111 Ill. App. 323, to the same effect. Hence, the courts sometimes say that where inconvenience or injury results in common to all citizens from the same source of complaint, it constitutes a common or public nuisance: *Mayor etc. v. Marriott*, 9 Md. 160, 66 Am. Dec. 326. And likewise it is said that the nuisance is public where it affects the rights enjoyed by citizens as part of the public; as, for instance, the right of navigating a river or traveling on a public highway: *King v. Morris etc. R. Co.*, 18 N. J. Eq. 397. But to be a public nuisance, the nuisance does not necessarily have to affect the government or the whole community of the state. It is sufficient if it affects the surrounding community generally or the people of some local neighborhood: *Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763. It has been said by some of the courts that the nuisance is a public one if it affects the community at large or some considerable portion of it, such as the inhabitants of a town: *Hundley v. Harrison*, 123 Ala. 292, 26 South. 294; *Baltzeger v. Carolina Midland Ry. Co.*, 54 S. C. 242, 71 Am. St. Rep. 789, 32 S. E. 358. In the principal case (*Acme Fertilizer Co. v. State*, 34 Ind. App. 346, ante, p. 190, 72 N. E. 1037), it was said that anything which is an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life and property by an entire community or neighborhood, or any considerable number of persons, is a public nuisance. And it has also been said that a nuisance to be a public one must be in a public place, or where the public frequently congregate, or where members of the public are likely to come within the range of its influence, for if the ac. or use of property be in a remote and unfrequented locality, it will not, unless *malum in se*, be a public nuisance: *City of Burlington v. Stockwell*, 5 Kan. App. 569, 47 Pac. 988, 989. Con-

sequently, it has been tersely said that a public nuisance is one which annoys such part of the public as necessarily come in contact with it: *Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478; *Jones v. City of Chanute*, 63 Kan. 243, 65 Pac. 243; *Kelley v. City of New York*, 27 N. Y. Supp. 164, 6 Misc. Rep. 516. The main idea seems to be that a nuisance, in order to be a public one, must affect the people in the neighborhood or the public generally in contradistinctions to a few people only: *State v. Luce*, 9 Houst. 396, 32 Atl. 1076. And it has been said that public or common nuisance is one that affects the people, and is a violation of a public right, either by direct encroachment or by doing some act which tends to a common injury or by omitting to do that which the common good requires: *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; *United States v. Debs*, 64 Fed. 724, 740.

The terms "public" and "common" nuisances are used interchangeably: *Mayor etc. v. Marriott*, 9 Md. 160, 66 Am. Dec. 326. Public nuisances are generally deemed as being in the nature of offenses against the state, and the perpetrators are subject to a criminal prosecution for the maintenance of such nuisances: *Hundley v. Harrison*, 123 Ala. 292, 26 South. 294; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709; *Commonwealth v. Upton*, 6 Gray, 473; *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; *Powoll v. Bentley etc. Furniture Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; *Jones v. St. Paul etc. Ry. Co.*, 16 Wash. 25, 47 Pac. 226; monographic note to *South Carolin: Steamboat Co. v. Wilmington etc. R. Co.*, 57 Am. St. Rep. 693; notes to *City of Fort Worth v. Crawford*, 15 Am. St. Rep. 845, and *Booth v. People*, 78 Am. St. Rep. 235.

b. Under Statutory Provisions.

1. **Similarity of Code Definitions with Those of the Common Law.** In perhaps most of the states, public nuisances are defined by the statutes. But as a general rule such statutory definitions are mere formulations of the common-law definitions: See *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, ante, p. 190, 72 N. E. 1037; *State v. Nease (Or.)*, 80 Pac. 897; *People v. Metropolitan Traction Co.*, 50 N. Y. Supp. 1117; *North Point etc. Irr. Co. v. Utah etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168, 40 L. R. A. 851. The statutory definition in force in California is perhaps a general example of such definitions. It is as follows: "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, by an entire community or neighborhood, or by any considerable number of persons or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street or highway, is a public nuisance": Pen. Code, sec. 370.

2. **Power of Legislature to Declare Certain Acts to be Public Nuisances or Enlarge Category of Public Nuisances.**—It seems that the legislature has power to enlarge the category of public nuisances by declaring places or property used to the detriment of public interests, or to the injury of the health, morals, or welfare of the community to be nuisances, although not such at common law: *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134. In this general connection, see, also, *Ex parte Lacey*, 108 Cal. 326, 49 Am. St. Rep. 93, and note, 41 Pac. 411, 38 L. R. A. 640, and *Bepley v. State*, 4 Md. 264, 58 Am. Dec. 628. But it is also said that a particular use of property is not a nuisance merely because so declared by a city ordinance: *Board of Aldermen v. Norman*, 51 La. Ann. 786, 25 South. 401. And it has been held that a municipal corporation has no power to declare a particular use of property a nuisance unless such use comes within the common law or the statutory idea of a nuisance, though its charter purports to confer upon it the power to prevent and restrain nuisances and to declare what shall constitute a nuisance: *Grossman v. City of Oakland*, 30 Or. 478, 60 Am. St. Rep. 832, 41 Pac. 5, 36 L. R. A. 593. Though of course it is held that a legislative body has the power to declare that to be a nuisance which is such in fact: *County of Los Angeles v. Spencer*, 126 Cal. 670, 77 Am. St. Rep. 217, 59 Pac. 202. A discussion of the constitutionality of statutes or ordinances attempting to declare certain acts to be public nuisances would be foreign to the scope of this note. Hence, we shall content ourselves with the statement that the general rule seems to be that a municipal body cannot by ordinances declare that to be a nuisance which is not such in fact: *Ward v. City of Little Rock*, 41 Ark. 526, 48 Am. Rep. 46; *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693; *Harmon v. City of Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434, 13 L. R. A. 481; *Everett v. City of Council Bluffs*, 46 Iowa, 66; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *State v. Jersey City*, 29 N. J. L. 170; *St. Paul v. Gilfillan*, 36 Minn. 298, 31 N. W. 49; *Quintini v. City of St. Louis*, 64 Miss. 483, 60 Am. Rep. 62, 1 South. 625; monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 545. Likewise, it is said that the legislature cannot authorize a municipality to make that a nuisance which is not such in fact: *City of Grand Rapids v. Powers*, 89 Mich. 94, 28 Am. St. Rep. 293, 50 N. W. 661, 13 L. R. A. 684. Sometimes, however, the general statement is made that it is the province of the legislature, within the fundamental limitations of its authority, to prescribe what shall constitute a nuisance: *State v. Beardsley*, 108 Iowa, 396, 79 N. W. 138. In *Langel v. City of Bushnell*, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266, the court drew some distinctions in this general respect which are not always stated in the cases on the subject; it said: "Nuisances may be thus classified:

1. Those which in their nature are nuisances per se or are so denounced by the common law or by statute; 2. Those which in their nature are not nuisances, but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc.; 3. Those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances, and to abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances, but as to those falling within the second class the power possessed is only to declare such of them to be nuisances as are in fact so. With these distinctions kept clearly in view no difficulty will be found in harmonizing the decisions in question."

On this general question, see, also, the note on acts which the legislature may declare to be criminal, attached to *Booth v. People*, 78 Am. St. Rep. 235, and also the note attached to *Hutton v. Camden*, 23 Am. Rep. 212.

3. Effect of Statutes on Common-law Nuisances.—Statutes prohibiting certain nuisances do not supersede the common law as to other acts which constitute a public nuisance under the common law: *State v. Boll*, 59 Mo. 321. Likewise, a statute defining what are nuisances and prescribing a remedy by action does not take away any common-law remedy in the abatement of nuisances that the statute does not embrace: *Stiles v. Laird*, 5 Cal. 120, 63 Am. Dec. 110. And it is held that the fact that acts are made by a penal code misdemeanors, and punishable as such does not make them less a nuisance nor imply that the legislature intended to make the criminal remedy exclusive of the civil: *People v. Truckee Lumber Co.*, 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581. So, also, it is held that the right of abating or indicting a public nuisance is not affected by a statute imposing a penalty for the offense, unless negative words are added evincing an intent to exclude common-law remedies: *Henwick v. Morris*, 7 Hill, 575.

In the recent case of *State v. De Wolfe*, 67 Neb. 321, 93 N. W. 746, the code particularly set forth what acts shall be deemed a nuisance, and provided a penalty therefor, but failed to specify the acts complained of as a public nuisance. The court said. "The question then to be considered is whether common-law nuisances which have not been enumerated in the Criminal Code are punishable as crimes. In this state all public offenses are statutory. No act is criminal, unless the legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law: *Criminal Code*, sec. 251; *Wagner v. State*, 43 Neb. 1, 61 N. W. 85; *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355; *Estes v. Carter*,

10 Iowa, 400. But while there are in this state no common-law crimes, the definition of an act which is forbidden by the statute, but not defined by it, may be ascertained by reference to the common law: *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355; *Mitchell v. State*, 42 Ohio St. 383; *State v. Twogood*, 7 Iowa, 252; *Estes v. Carter*, 10 Iowa, 400; *Pitcher v. People*, 16 Mich. 142; *Prindle v. State*, 31 Tex. Cr. 551, 37 Am. St. Rep. 833, 21 S. W. 360. A statute declaring all common nuisances to be criminal is to be construed as prohibiting every act which was by the common law indictable as a nuisance. These nuisances are, as Mr. Greenleaf has said, 'a species of offense against the public order and economical regimen of the state': 3 Greenleaf's Evidence, 184. They are generally under the ban of the law because the experience of ages has shown that their tendency is hurtful to the public. Perhaps the common barrator, the common eavesdropper, and the common scold are no longer formidable evils, but certainly most of the other common-law nuisances are as injurious and detrimental to society now as they ever were. There is as much reason now as there ever was to repress conduct calculated to injure the health and morals of the people or to shock their religious feelings or their sense of decency, or to endanger their lives or property, or to disturb the peace of the neighborhood. Without a clear expression of its purpose so to do, we cannot believe that it was the intention of the legislature to so limit the meaning of the word 'nuisance,' as to make conduct blameless which has always been considered inherently wrong and deserving of punishment. If the theory upon which the trial court decided this case is correct, a large number of common-law nuisances are not crimes in this state, and many vicious, immoral and revolting acts may be committed in public with impunity."

III. Distinction Between Public Nuisances and Purprestures.

A purpresture exists where one incloses or makes several to himself that which ought to be common to many: *People v. Park etc. R. Co.*, 76 Cal. 156, 18 Pac. 141; monographic note on purprestures attached to *Revell v. People*, 69 Am. St. Rep. 271. A purpresture and a public nuisance may coexist, or either may exist alone without the other, but there is a difference between a purpresture and a public nuisance: Monographic note to *Revell v. People*, 69 Am. St. Rep. 271. In *Attorney General v. Evart Booming Co.*, 34 Mich. 462, 473. Chief Justice Cooley said: "It is, however, to be observed of a purpresture that it is not necessarily a public nuisance. A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public to any inconvenience whatever."

See, also, *United States v. Debs*, 64 Fed. 724, 740, to the same general effect. In *Hicks v. Smith*, 109 Wis. 532, 85 N. W. 512, which was a case with respect to obstructions in a navigable lake, the court observed: "It is true that a purpresture on the public land is not necessarily a public nuisance: *Gould on Waters*, 2d ed., sec. 21. A purpresture is a permanent invasion of the public land. A nuisance is an injury to the public rights of navigation, fishing, and the like."

IV. Distinction Between Public and Private Nuisances.

In subdivision II, a, in discussing the general nature of nuisances, we necessarily set forth the main differences between public and private nuisances; hence, we shall merely refer to such cases as remarked upon the distinction between the two general classes of nuisances. It seems that a nuisance may be both a public and a private nuisance at the same time: *Yolo County v. City of Sacramento*, 86 Cal. 193; *Wylie v. Elwood*, 134 Ill. 281, 23 Am. St. Rep. 673, 25 N. E. 510, 9 L. R. A. 726; *Kuhn v. Illinois Cent. R. Co.*, 111 Ill. App. 323; *Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478, 481; *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, ante, p. 190, 72 N. E. 1037. Or, in other words, a public nuisance becomes also a private nuisance as to any person who is specially injured by it to any extent beyond the injury to the public: *Kavanagh v. Barber*, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689; *Ackerman v. True*, 175 N. Y. 353, 67 N. E. 629; *Powell v. Bentley etc. Furn. Co.*, 24 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53. But it may be questioned whether a public nuisance can ever become a private nuisance to the extent of being entirely governed, as far as remedial rights are concerned, by the same rules which obtain where the nuisance is solely a private nuisance: See *Woodruff v. North Bloomfield etc. Co.*, 18 Fed. 753, 788; *Mississippi etc. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311. In *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 593, 37 L. R. A. 497, it was said: "The difference between a public nuisance and a private nuisance does not consist in any difference in the nature or character of the thing itself. It is public because of the danger to the public. It is private only because the individual as distinguished from the public has been or may be injured. Public nuisances are indictable. Private nuisances are actionable, either for their abatement or for damages, or both. If the storing of gunpowder so near another's dwelling in the country, where there is no other building, that an explosion would damage the owner, be not a private nuisance per se, the storing of the powder in a city will not be a public nuisance, per se."

Likewise, in *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89, it was held that a public nuisance may be a private one as to persons who are actually injured by it beyond such as are presumed to have

been suffered by every citizen from the nuisance. Hence, it is said, in a general way, that a nuisance is public when it affects the surrounding community generally and impairs the rights of neighboring residents as members of the public, and private when it especially injures individuals: *Chesbrough v. Commissioners*, 37 Ohio St. 508.

Nuisances were classified into public, private, and mixed, by the court in *Kelley v. City of New York*, 6 Misc. Rep. 516, 27 N. Y. Supp. 164. The court saying: "Nuisances are of three kinds—public, private, and mixed. They are public, when they violate public rights, and produce a common injury; when they injure or annoy that portion of the public which necessarily comes in contact with it. They are private when the injury resulting from them violates only private rights, and produces damages to a few persons only. Mixed nuisances are those which are both public and private in their effects—public because they injure many persons, or all the community; and private in that they also produce special injury to private rights: *Wood on Nuisances*, p. 22. It is not always easy to determine the class to which any given injury is to be designated. In this case it is plain that the injury is not a mere private nuisance. Its injurious effects and fatal consequences fall upon all who use the polluted water; and that may include not only the million and a half of inhabitants of the city, but also all who visit there. The nuisance created and continued by the plaintiff is either public or mixed, and in my judgment it is public, because it corrupts and poisons water which all have a right to use. It is, in its nature and consequences, an injury to all who come within the sphere of its operation; and that may be millions of human beings. The question is only important in reference to the right of the plaintiff to prescribe for the nuisance, for in this state no person can obtain a prescriptive right to maintain a public nuisance: *Wood on Nuisances*, p. 743. It is presumed the same rule applies to a mixed nuisance as that is in one sense public."

V. Who Constitute "the Public."

In a general way, the courts frequently say that the injury from a nuisance, in order to constitute the nuisance a public one, must affect "the public." Hence it may be well to consider how the courts have construed the phrase "the public." In *Jones v. City of Chanute*, 63 Kan. 243, 65 Pac. 243, the court said: "It is often difficult to tell whether a nuisance is so general in its character—that is, affects a sufficient number of persons—to justify its characterization as a 'public nuisance.' In such cases, how many persons shall be called 'the public'! Of course in one sense, the public is everybody; but manifestly, that is not the sense in which the word is used in the law relating to nuisances. In that law by the words 'the

public' is meant those who reside in definite municipal boundaries, entitled to the protection of the local laws, and to be represented by the local officers, and yet cases of nuisances affecting all the people of the local municipality will rarely occur. The words 'the public' must therefore have even a narrower signification, and be inclusive of even a less number. We think that the definition of the words with relation to the subject in hand is quite clearly indicated, if not stated, in a note to Wood on Nuisances, wherein he says: 'It has now come to be understood that a public nuisance does not necessarily consist in any act or thing which does in fact annoy all the public but to that which may annoy all who may come in contact with it.' "

In *State v. Luce*, 9 Houst. 396, 32 Atl. 1076, it was observed that: "The term 'public' does not mean all the people, nor most of the people, nor very many of the people of a place; but so many of them as contradistinguishes them from a few."

VI. What Constitutes a Public Nuisance per Se.

Nuisances per se are defined as such things as are nuisances at all times and under all circumstances, irrespective of location or surroundings, such as things hurtful to morals, or dangerous to life, or injurious to public rights: *Hundley v. Harrison*, 123 Ala. 292, 26 South. 294. In another Alabama case (*Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 593, 37 L. R. A. 497), the court, in discussing the effect of nuisances per se, said: "The distinction is clearly stated in the case of the Earl of Ripon v. Hobart, 1 Cowp. 861. Cas. 333, 3 Mylne & K. 169, 3 L. J. Ch. 145, by Lord Brougham: 'If the thing sought to be prohibited is in itself a nuisance the court will interfere to stay irreparable mischief without waiting for the result of a trial. But when the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the court will refuse to interfere.' This construction is in accordance with the common law that 'a nuisance per se is that which worketh hurt,' or as defined in the encyclopedia, 'working such an effect upon the right of another that the law will presume a consequent damage.' Unless the thing, of itself, because of its inherent qualities, without complement, is productive of injury, or, by reason of the manner of its use or exposure, threatens or is dangerous to life or property, it cannot be said to be a nuisance per se at common law. If an occupation be lawful, and by care and precaution it can be conducted without danger or inconvenience to another, the occupation is not per se a nuisance, and if such an occupation or business becomes a nuisance, it is because of a want of proper care and precaution."

The effect of improved appliances suggested by the experience and science of modern times was specially considered in the recent case of *Windfall Mfg. Co. v. Pattersen*, 148 Ind. 414, 62 Am. St. Rep. 532,

47 N. E. 2, 37 L. R. A. 381, it was there said: "A nuisance, per se, as the term implies, is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. Such a nuisance is a disorderly house, or an obstruction to a highway or to a navigable stream. But a business lawful in itself cannot be a nuisance per se, although because of surrounding places or circumstances, or because of the manner in which it is conducted, it may become a nuisance. Certain kinds of business or structures, as powder-houses or nitroglycerin works, are so dangerous to human life that they may be maintained only in the most remote and secluded localities. Others, as slaughter-houses and certain foul-smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even from the near neighborhood of family residences. Yet there must be some proper place where every lawful business may be carried on, without danger of interference in the part of those, who in some slight degree, may be annoyed or endangered by the nearness of the objectionable occupation.

"Of course, all persons have the right to insist that a business in any degree offensive or dangerous to them shall be carried on with such improved means and appliances as experience and science may suggest or supply, and with such reasonable care as may prevent unnecessary inconvenience to them. By such care and improved methods and appliances, many occupations, formerly regarded as nuisances, may now be carried on, even in populous neighborhoods, without annoyance to anyone. So an establishment in some degree offensive, as a livery stable, may be kept so cleanly, so free from anything to offend the sense of sight or of smell, that the proprietor may invite his most fastidious visitors to any part of it; although the same establishment might also be so kept as to be an abomination even to the passer-by upon the highway.

"It cannot be said that a plant for the manufacture of brick and drain tile, or even a gas well sunk to supply fuel for such a plant, is a nuisance per se. The business is lawful, and if located in a proper place, and conducted and maintained in a proper manner, neither the plant nor the well can be treated as a nuisance." But it has also been held that inasmuch as the people of a community have a right to pure, untainted, and inoffensive air, that whatever of itself deprives them or interferes with their enjoyment of such right necessarily is, of itself a nuisance of a public character, but if the odors which would so interfere with the enjoyment of the air do not reach a populous neighborhood or do not pervade the traveled highway, it cannot be said to be a public nuisance per se: *State v. Luce*, 9 Houst. 396, 32 Atl. 1076.

VII. Effect of Intent on Creation or Maintenance of a Public Nuisance.

It seems to be the rule that it is immaterial whether the person causing or creating a public nuisance intended the prejudicial results to flow from the acts creating the annoyance, since it is presumed that every sane man intends the natural and probable consequences of his acts: *Seacord v. People*, 121 Ill. 623, 13 N. E. 194; *State v. Towler*, 13 R. I. 661; *Commonwealth v. Dicken*, 145 Pa. St. 453, 22 Atl. 1043; *People v. Burtleson*, 14 Utah, 258, 47 Pac. 87.

But in this general connection, see *Stein v. State*, 37 Ala. 123; *State v. Gifford*, 111 Iowa, 648, 82 N. W. 1034; *People v. Crounse*, 51 Hun, 489, 4 N. Y. Supp. 266.

VIII. Necessity for the Acts or Thing Complained of to be the Proximate Cause of the Alleged Public Nuisance.

To constitute a person guilty of maintaining a public nuisance, the injurious effects producing the nuisance must be the natural, direct, and proximate result of his acts, and not the effect caused by the acts of others so operating on his acts as to produce the injurious effects complained of: *State v. Rankin*, 3 S. C. 438, 16 Am. Rep. 737; *Gay v. State*, 90 Tenn. 645, 25 Am. St. Rep. 707, 18 S. W. 260. Hence it has been held that, to maintain an indictment against one for a public nuisance, it is not sufficient to merely show that the defendant owned the land on which it exists, but it must also be shown that he either erected, or continued it, or in some manner sanctioned its erection or continuance: *People v. Townsend*, 8 Hill, 479. But the continuance of a building erected by others within the limits of a highway has been held to be an indictable nuisance: *Commonwealth v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654. A person maintaining a dam which creates a nuisance no greater nor of any different character from what would have existed without its existence, is not punishable as being guilty of the nuisance: *Beach v. People*, 11 Mich. 106.

IX. Necessity for the Acts or Things Complained of to be a Subsisting and not Merely a Prospective Public Nuisance.

It seems that where the injury to the public is doubtful, or eventual, or contingent, the acts complained of will not be declared to be a nuisance until they have actually demonstrated their injurious character: *Laughlin v. Lancasco City*, 6 Ind. 223. Hence it has been held that the fact that a bill-board may become a place for the resort of lewd characters does not make it a public nuisance: *Gunning System v. City of Buffalo*, 62 App. Div. 497, 71 N. Y. Supp. 155. Likewise it has been held that the frame of a mill dam will not be declared to be a nuisance because it may, when completed, create a nuisance: *State v. Suttle*, 115 N. C. 784, 20 S. E. 725.

•X. Necessity for Annoyance or Hurt to Exist.

It has been said that there must be a material annoyance, inconvenience, discomfort, or hurt and violation of another's rights in an essential degree to constitute a public or private nuisance: *City of Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123, 46 N. W. 128, 8 L. R. A. 808. But it seems to be sufficient if the acts or things complained of as a public nuisance will annoy such part of the public as necessarily come in contact with it: *Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478; *Jones v. City of Chanute*, 63 Kan. 243, 65 Pac. 243; *Kelley v. City of New York*, 27 N. Y. Supp. 164, 6 Misc. Rep. 516. Or if the injurious acts be done in a public place or where the public are likely to come within the range of the injurious effects: *Burlington v. Stockwell*, 5 Kan. App. 569, 47 Pac. 988. And it was even held in Massachusetts on the trial of a common nuisance based on the uttering of loud exclamations and outcries in a public street, that it was no defense that the crowd attracted by the noise not only were not annoyed, but encouraged the boisterous and profane conduct. The court saying: "The act must be of such a nature as tends to annoy good citizens and does in fact annoy such of them as are present and not favoring it. But it may happen that there are persons present who give encouragement and countenance to the illegal act. In a disorderly house or a gambling-house, such persons are always present. Yet that fact is no defense. The evidence on that point was not material and was properly rejected": *Commonwealth v. Harris*, 101 Mass. 29.

XI. What Constitutes a Sufficient Hurt or Annoyance to Amount to a Public Nuisance.

a. In General.—In stating the general rule as to what circumstances constitute a public nuisance, the court in *City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693, said: "Almost every case involving the question of a nuisance in the use of property is determined in view of its own circumstances, and, as a general rule, the relative rights of the parties control; the question being whether or not the use of the property in the manner complained of is reasonable and in accordance with such relative rights: *Wood on Nuisances*, sec. 12. 'As to what constitutes a nuisance is a question for the court and not the jury to determine; whether the results of a given business are so common as to amount to a public nuisance is a question for the jury': *Wood on Nuisances*, sec. 22. And the same author states the rule in such cases to be that 'the question is not whether an act has been declared to be, but does it come within the idea of, a nuisance. If so, it is one, though never held so before; if not, it is not one, though held so a thousand times before': *Wood on Nuisances*, sec. 27. Whether a particular use that is not a nuisance per se is an unreasonable use and a nuisance, is a question of fact, to be judged of

from the circumstances of each case by the jury: Wood on Nuisances, sec. 251, and cases cited."

By the use of care and improved methods and appliances many occupations formerly regarded as nuisances because of their annoyance to the senses may now be carried on in even populous neighborhoods without annoyance to anyone, and hence without becoming public nuisances: Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 62 Am. St. Rep. 532, 47 N. E. 2, 37 L. R. A. 381. In laying down the rule as to the amount of annoyance essential to constitute a nuisance, Mr. Justice Holt, in *Powell v. Bentley etc. Furn. Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53, in a very well-considered opinion, said: "For such standard it will not do to take the man who, by reason of his sensitive nature, inborn or acquired, or by reason of his habits or mode of living, is supersensitive to the annoyance complained of; nor, on the other hand, are we to take one who, by nature or habit, is abnormally insensible to such things. The idiosyncracies or peculiar habits or modes of living of neither class furnish the proper test; and this, not because the oversensitive man, or man in ill-health, has less right, but because it is impossible in practice for the law to extend to him exceptionable immunity or protection. Therefore we must take as our standard the normal man; the one of ordinary sensibility; of ordinary habits of living; the plain, well-to-do people who make up the great mass of our busy world. If this should lead to hardship in particular cases, such as sickness, practical convenience makes it impossible to have any other criterion. In such cases we must appeal to the humanity and goodwill of our neighbor, rather than to any supposed enforceable right of our own."

b. **Violations of Civil or Property Rights.**—The violation of the property rights of the citizens may constitute a public nuisance. Thus in *State v. Missouri Pac. Ry.* (Kan.), 81 Pac. 212, which was an action on the relation of the state for the maintenance of a nuisance in maintaining a passageway, or trail for the passage of infected cattle, the court, in sustaining the power of the legislature to declare the act in question to be a public nuisance, said: "To place in jeopardy the animal industry of a state where stock-raising is one of the principal sources of wealth is a matter of concern to all. A menace of such nature should be met with prompt preventive measures by those charged with the duty of enforcing the laws."

Other instances in which violations of civil or property rights were held to constitute public nuisances will be found in subdivision XV.

c. **Hurts or Annoyances Affecting the Senses or Physical Comforts.**

1. **In General.**—The general rule in respect to such annoyances as affect the senses or physical comforts was stated in *City of Fort Worth v. Crawford*, 74 Tex. 404, 15 Am. St. Rep. 840, 12 S. W. 52, as follows: "There is also no doubt that every person has a right to

have the air diffused over his premises free from noxious vapors and noisome smells that would not exist there except for the acts of the party complained of, and which are prejudicial to health or nauseous to the smell, or trench upon the rights of the person affected thereby: Wood on Nuisances, 471-473. 'In case of noisome smells arising from noxious vapors, the stench must be of such a character as to be offensive to the senses, or to produce actual physical discomfort, such as naturally interferes with the comfortable enjoyment of property. It is not necessary that it should be hurtful or unwholesome. It is sufficient if they are so offensive or produce such annoyance, inconvenience, or discomfort as to impair the comfortable enjoyment of property by persons of ordinary sensibilities': Wood on Nuisances, sec. 495." It is in accordance with this rule that a carpet cleaning establishment, located in a neighborhood devoted to private residences and rendering an adjoining house uncomfortable by the dust and moths from the carpets in process of cleaning, was held to be a nuisance, though it was not declared whether it constituted a public nuisance: Rodenhansen v. Craven, 141 Pa. St. 546, 23 Am. St. Rep. 306, 21 Atl. 774. And in this general connection see, also, Ex parte Lacey, 108 Cal. 326, 49 Am. St. Rep. 98, 41 Pac. 411, 38 L. R. A. 640, holding that the operation of a steam shoddy machine or steam carpet beating machine within a hundred feet of any church, schoolhouse, or residence may be prohibited by municipal ordinance. But the making of noises or sounds of an annoying character seem to be regarded as constituting physical discomforts and not mere imaginary ills: See Bishops v. Banks, 33 Conn. 118; Soltan v. De Held, 2 Sim., N. S., 133. But see subd. XV, c, post.

2. Effect Where Act or Thing is Hurtful Only to Persons Peculiarly Susceptible.—Where the act or thing is hurtful only to persons peculiarly susceptible, it will not be deemed sufficient to constitute a public nuisance. Thus, it has been held that injury to a single person from lead poisoning, because of a peculiar and exceptional susceptibility to such influence, when the trace of arsenic or lead is so slight as not to affect other persons in any degree, is not sufficient to make the lead works a common nuisance: Price v. Grantz, 118 Pa. St. 402, 4 Am. St. Rep. 601, 11 Atl. 794. That the standard by which to gauge when an annoyance amounts to a public nuisance is not that which would annoy a supersensitive person, nor that which would not annoy a person who is abnormally insensible to such things, but, as was said by Justice Holt in Powell v. Bentley etc. Furn. Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53, the standard is "the normal man; the one of ordinary sensibility, of ordinary habits of living, the plain, well-to-do people who make up the great mass of our busy world." In this connection see, also, State v. Woodbury, 67 Vt. 602, 32 Atl. 495.

3. **Sufficiency of Offensiveness to Senses Without Causing Danger to Health.**—Any trade or business carried on in a populous neighborhood or near a public road which produces noxious or offensive smells, is a common nuisance, even though the smells are not injurious to health, provided that they are offensive to the senses: *State v. Wetherall*, 5 Harr. (Del.) 487; *Ashbrook v. Commonwealth*, 1 Bush, 139, 89 Am. Dec. 616; *State v. Woodbury*, 67 Vt. 602, 82 Atl. 495.

4. **Necessity to Affect Physical Discomfort and not Merely the Imagination.**—In *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201, which was a proceeding by a large number of citizens to restrain the building of a gas holder or tank in the midst of district devoted to fine residences, the court said: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained; and smoke, noise, and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it anyone not compelled by poverty to remain.

"Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated, make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life, is a wrong which the law will redress. The only question is what amounts to that discomfort from which the law will protect.

"The discomforts must be physical, not such as depend upon taste and imagination."

In like manner it is held that places which emit dense smoke or cinders are not mere imaginary discomforts: See *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654.

d. **Hurts or Annoyances from Places or Things Merely Offensive to the Sight.**—Matters that are annoyances by being merely disagreeable or unsightly, as a well-kept butcher shop or vegetable stall near costly dwellings, or businesses, that attract crowds of orderly persons, or numbers of carts and carriages, are not nuisances, even though they seriously affect the value of property by driving tenants away and preventing property from being rented to those who would pay high rents: *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654. Likewise in *Quintini v. City of Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62, 1 South. 625, it was held that the legislature could not declare private residences to be nuisances because they depreciate the value of property of persons near by, or obstruct the view of other residences, or intercept cool breezes which daily blow in from the sea. The court saying: "There is scarcely, either in the answer or the evidence, a suggestion that the object of the ordinance and legislative declaration is other than to enhance the beauty of the street. The

suggestion that the health of the town will be impaired by the obstructing of the health-giving breezes raises the pertinent inquiry why they will not be equally obstructed by the residences on the other side of the street, and the fact that the view will be obstructed suggests the further question whether a view can be taken from one man because it can be enjoyed only from the rear of his house and conferred upon another, whose only superior equity is that it is unfolded in his front. The law can know no distinction between citizens because of the superior cultivation of the one over the other. It is with common humanity that legislatures and courts must deal, and that use of property which in all common sense and reason is not a nuisance to the average man cannot be prohibited because repugnant to some sentiment of a particular class. That the legislature, in the exercise of the police power, may prohibit in particular localities such use of property as is injurious to public health is admitted, and what it may do may also be authorized to be done by the local authorities, but it does not follow that it may by a mere declaration convert the harmless, proper, and ordinary use of property into a nuisance. Where the use of the land furnishes the test for the determination of the constitutionality of the law, the legislature may not conclusively determine the effect to be harmful."

So, also, the construction and maintenance of an automobile station or garage for the entertainment of chauffeurs and their friends on a boulevard at Rockaway Beach in a neighborhood occupied by expensive summer residences was held not to amount to a common-law nuisance: *Stein v. Lyon*, 91 App. Div. 593, 87 N. Y. Supp. 125. The ordinary use of a railroad yard for the purpose of "packing" cars is not a nuisance per se: *State v. Marshall*, 50 La. Ann. 1176, 24 South. 186. The same question frequently arises under ordinances respecting billboards or other advertising displays upon private land. The validity of such ordinances is frequently challenged as being unreasonable, though, of course, if the advertisements were indecent or the advertising devices were dangerous to the physical safety of the public, it would seem as if they could be sustained as coming within the idea of public nuisances. In this connection see *Crawford v. City of Topeka*, 51 Kan. 756, 37 Am. St. Rep. 323, 33 Pac. 476, 20 L. R. A. 692; *City of Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929; *Longmaid v. Reed*, 159 Mass. 409, 34 N. E. 593; *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 108 Am. St. Rep. 494, 74 N. E. 601, 69 L. R. A. 817; *Rochester v. West*, 164 N. Y. 510, 79 Am. St. Rep. 659, 58 N. E. 673; *Gunning System v. City of Buffalo*, 75 App. Div. 31, 77 N. Y. Supp. 987; *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460.

e. Hurts or Annoyances to the Moral Sensibilities.—In some instances hurts to the moral sensibilities have been regarded as indictable nuisances. Thus it has been held to be an indictable offense to inflict punishment on a servant or slave to the annoyance of citizens whose business or pleasure carry them near the scene of infliction: *Hickerson v. United States*, 2 Hayw. & H. 228, Fed. Cas. No. 18,301. Likewise, it was held that public cruelty to a cow and beating her to death in or near a public street is indictable at common law as a public nuisance: *United States v. Jackson*, 4 Cranch. C. O. 483, Fed. Cas. No. 15,453. So, also, the keeping of calves overnight at a slaughter-house where they annoy the community by their wailing and bleating was held to constitute a nuisance though it is not clear whether a public one or not: *Bishop v. Banks*, 33 Conn. 118, 87 Am. Dec. 197. The use of land or a building for the holding of a prize fight seems also to be regarded in the nature of a public nuisance: *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261. And the exhibiting of a stud horse in a town was held to be such a nuisance as could be prohibited: *Nolin v. Mayor etc. of Franklin*, 4 Yerg. 163. And in *Thompson v. City of Paterson*, 9 N. J. Eq. 624, the court said: "The mere erection of a building intended as a poorhouse and workhouse is in itself no injury to anybody if the intention be never carried out." But in *Ward v. City of Little Rock*, 41 Ark. 526, 48 Am. Rep. 46, the working of hired convicts on the city streets was held not to constitute a nuisance.

f. Public Character of Nuisance as Dependent upon Locality or Surroundings.—A business which is not a nuisance per se may become such by reason of the particular locality in which it is situated, as where a coalshed is located in the heart of a city, in the midst of stores and dwellings, and so operated as to make grating and grinding noises and to scatter dust and dirt, to the injury and discomfort of the occupants of adjoining property: *Wylie v. Elwood*, 134 Ill. 281, 23 Am. St. Rep. 673, 25 N. E. 570, 9 L. R. A. 726. The maintenance of plants for the manufacture and storage of explosives offers also an illustration of the rule just stated: See subd. XV, c. 2, post.

g. Effect of Territory or Number of Persons Affected on Public Character of the Nuisance.—A business or occupation need not be an injury to all citizens of the state in order to be a public nuisance: *Moses v. State*, 58 Ind. 185. If the annoyance is such as to materially interfere with the ordinary comfort of human existence, it is a nuisance; and if the annoyance is one that is common to the public generally then it is a public nuisance. The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. Hence it may be said that the nuisance is a public one if it injures the citizens generally who may be so circumstanced as to come within its influence: *Nolan v. City*

of New Britain, 69 Conn. 668, 38 Atl. 703; *Baltzeger v. Carolina Midland Ry. Co.*, 54 S. C. 242, 71 Am. St. Rep. 789, 32 S. E. 358; *Soltan v. De Held*, 2 Sim., N. S., 133. Or, as was said by one court, the nuisance is a public one if it occurs in a public place, or where the public frequently congregate, or where numbers of the public are likely to come within the range of its influence: *City of Burlington v. Stockwell*, 5 Kan. App. 569, 47 Pac. 988. In *State v. Luce*, 9 Houst, 396, 32 Atl. 1076, it was said: "When, with reference to an alleged nuisance, the people or citizens of a neighborhood or the public are mentioned, it does not mean all the people, or of the public, but only such considerable number of them as to show that more than a few merely are meant. No general definition can be given, to denote precisely what is meant by 'few' or 'many,' nor can any be precisely given of the limits expressed by the term 'neighborhood.' It is sufficient to say of the latter term that in the case of an operating nuisance every part is in the neighborhood which is affected by it. 'Few' and 'many' are to be considered with reference to the surroundings. If there is a nuisance affecting a place and a very small number only are victims of it, it would be an injury to but a few, and while they would have their separate actions for compensation in damages for the injury, there would be no public evil for an indictment.

"Let me illustrate this: If one were to erect a pigpen or slaughterhouse, or were to store fertilizers in a town, and a few people only in that immediate neighborhood were annoyed by it, there would be no indictable offense; if the annoyance extended to those generally about there, the owner would be indictable, although in point of fact only a small neighborhood of the town, for example, a single square, where there were many squares, was within the scope of the foul smells. If this were not so, a filthy pigsty would never be a public nuisance in a town, nor a stable badly kept, nor any other offensive object of limited range of odor. The term 'public' does not mean all the people, nor most of the people, nor very many of the people of a place; but so many of them as contradistinguishes them from a few."

h. Effect of Act Being Merely an Unauthorized One.—In *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371, Chancellor Kent, in the course of an elaborate opinion, observed that the carrying on of banking operations contrary to the statute was not a public nuisance.

1. Effect Where Act is not Habitual or Periodical.—To constitute a public nuisance it is not always necessary that the acts charged should have been habitual or periodical. Where a single act produces a continuing result, the offense may be complete without a recurrence of the act. Thus it seems that a single act which befouls a

spring of drinking water, or an indecent exposure of one's person in a public place, or the holding of a single prize-fight, constitutes a public nuisance: *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261. But it is also said that it is possible that a frequent and habitual repetition of acts which singly are but private nuisances may constitute a public or common nuisance: *State v. Baldwin*, 1 Dev. & B. 195.

XII. Matters in the Nature of Diminishing the Annoyance Resulting from the Act or Thing.

a. **Effect of Care and Precaution Against Creation of an Annoyance.**—If a lawful business is so carried on as to constitute a nuisance, it does not make it any the less a nuisance because it was carried on with skill and care: *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 63 Am. St. Rep. 533, 39 Atl. 270; *McAndrews v. Collier*, 42 N. J. L. 189, 36 Am. Rep. 508; *People v. Burtleson*, 14 Utah, 258, 47 Pac. 87. Thus the fact that a business, such as a slaughter-house, is carefully kept and well conducted and managed so as to create as little annoyance as possible does not prevent it from being a public nuisance if its nature is such as to annoy and injure the health of persons in its neighborhood: *Moses v. State*, 58 Ind. 185. Likewise, the mere fact that a dairy is kept as cleanly as possible in the reasonable prosecution of the business is held to be immaterial to the question whether it constitutes a public nuisance: *State v. Boll*, 59 Mo. 321.

b. **Effect of Public Benefit Also Resulting from the Alleged Public Nuisance.**—That an alleged public nuisance may be beneficial to the public to some degree does not prevent it from being a public nuisance if the effects of it are such as to bring it within the definition of a public nuisance: *Seacord v. People*, 121 Ill. 623, 13 N. E. 194; *State v. Kaster*, 35 Iowa, 221; *Respublica v. Caldwell*, 1 Dall. 150; *Works v. Junction R. Co.*, 5 McLean, 425, Fed. Cas. No. 18,046. But see, also, *People v. Horton*, 64 N. Y. 610, where the rule seems to have been modified to some extent. And see, also, the mining debris case of *Woodruff v. North Bloomfield etc. Min. Co.*, 18 Fed. 753, 9 Saw. 441.

c. **Effect Where the Alleged Public Nuisance is a Public Improvement.**—Works of internal improvement erected by the state for the benefit of citizens at large cannot be regarded as a public nuisance because they render the neighborhood unhealthy by obstructing running water and overflowing adjacent lands, and their character is not changed by placing them in the hands of a private corporation with a requirement that they be kept up for the purposes for which they were constructed, since the corporation, under such circumstances, occupies the same position as the commonwealth: *Commonwealth v. Reed*, 34 Pa. St. 275, 75 Am. Dec. 661.

**XIII. Matters in the Nature of an Excuse to do the Acts or Things
Complained of as a Public Nuisance.**

a. **Fact that Others are Guilty of Same Act or Thing.**—The fact that other persons are committing the same kind of nuisance in the same community is not regarded as a defense to a prosecution for maintaining a public nuisance: *Burlington v. Stockwell*, 5 Kan. App. 569, 47 Pac. 988; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *People v. Mallory*, 4 Thomp. & C. 567; *Austin v. Austin City Cemetery Assn.* (Tex. Civ.), 28 S. W. 1023; *Douglass v. State*, 4 Wis. 387. This general rule was also stated in *Powell v. Bentley etc. Furn. Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. B. A. 53, but with a slight modification, the court saying: "One nuisance does not justify another; still it may be taken as one of the surrounding circumstances to be considered in determining whether or not the other be a nuisance."

b. **Effect of Prescription on Right to Continue the Alleged Public Nuisance.**—The right to maintain a public nuisance cannot be acquired by prescription: *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Reed v. City of Birmingham*, 92 Ala. 339, 9 South. 161; *People v. Gold Run etc. Co.*, 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; *Platt v. City of Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154, 48 L. B. A. 691; *City of Lewiston v. Booth*, 3 Idaho, 692, 34 Pac. 809; *City of Bloomington v. Costello*, 65 Ill. App. 407; *State v. Phipps*, 4 Ind. 515; *Pettis v. Johnson*, 56 Ind. 139; *Kelly v. Pittsburg R. Co.*, 28 Ind. App. 457, 91 Am. St. Rep. 134, 63 N. E. 233; *Cain v. Chicago etc. R. Co.* 54 Iowa, 255, 3 N. W. 736, 6 N. W. 268; *Ashbrook v. Commonwealth*, 1 Bush, 139, 89 Am. Dec. 616; *Philadelphia etc. R. Co. v. State*, 20 Md. 157; *Veazie v. Dwinel*, 50 Me. 479; *Commonwealth v. Upton*, 6 Gray, 473; *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224; *Board of Health v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *Dygert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575; *State v. Holman*, 104 N. C. 861, 10 S. E. 758; *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; *Commonwealth v. Alburger*, 1 Whart. 469; *State v. Rankin*, 3 S. C. 438, 16 Am. Rep. 737; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *North Point etc. Irr. Co. v. Utah etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168, 40 L. B. A. 851; *Chase v. City of Oshkosh*, 81 Wis. 313, 29 Am. St. Rep. 898, 51 N. W. 560, 15 L. B. A. 553; monographic note to *Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 551. But it seems that there are instances where the principle of equitable estoppel may be invoked. Thus, where a turnpike company acted strictly within its charter and the law of the state, in constructing a gate within the street, it was held that the city, having permitted it to stand for over twenty-three years, could not contend that it was a public nuisance: *Conestoga etc. Turnpike Road Co. v. Lancaster City*, 151 Pa. St. 543, 24 Atl. 1092.

See, also, the discussion of the subject in *Baldwin v. Trimble*, 85 Md. 396, 37 Atl. 176.

c. **Effect of Pecuniary Interest Involved in Either the Doing or not Doing of the Act or Thing.**—Pecuniary interest will not excuse a nuisance which endangers public safety: *Mayer v. Thompson-Hutchinson Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88, 16 South. 620, 28 L. R. A. 433. Likewise, it was said in *Baltimore etc. Turnpike Road v. State*, 63 Md. 573, 1 Atl. 285, that: "It is no answer to an indictment for a nuisance that the corporation, through whose neglect of duty it existed is pecuniarily unable to abate it"; citing *Winship v. Enfield*, 42 N. H. 197; *Erie City v. Schwingle*, 22 Pa. St. 389, 60 Am. Dec. 87. But, in this connection, see, also, *Attorney General v. New York etc. R. Co.*, 24 N. J. Eq. 49.

d. **Neglect of Others as an Excuse.**—It is no defense to a prosecution for committing a public nuisance by discharging offensive substances into an artificial watercourse that the municipal corporation had failed to provide adequate drainage: *Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568. Likewise, it is no defense to an indictment for exercising a noxious trade in a public place that the selectmen have not assigned a place for the exercise of the trade as they may do under the statute: *State v. Hart*, 34 Me. 86.

e. **Effect Where Act or Thing is not Necessarily a Public Nuisance.** A mere use of property which is not necessarily a nuisance cannot be regarded as a nuisance: *State v. Owen*, 50 La. Ann. 1181, 24 South. 187. In this connection see, also, subd. II, b, 2, *ante*.

XIV. Matters in the Nature of a License or Authorization to do the Acts or Things Complained of as Public Nuisances.

a. **Effect of Judicial Authorization.**—It was held in *Watts v. Norfolk R. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894, 19 S. E. 521, 23 L. R. A. 674, that a dam erected to furnish power to operate a mill, useful to the public, under the authority of the court, was not a public nuisance. The court, in discussing the subject, said: "The county court had jurisdiction to grant leave to erect mills. It would be going far to say that if it authorized a mill, in a proper proceeding, which would obstruct navigation or fish, or omitted due provision against such obstruction, its action would be utterly void and confer no authority.

"But the mill act existing where this mill was allowed (Code 1819, c. 235), required the inquisition to report whether a mansion house would be overflowed, and whether, and in what degree, the passage of fish and navigation would be obstructed, and whether the health of the neighborhood annoyed; there was a positive prohibition against granting authority, but not so as to hindrance of navigation or passage of fish; but, as to that, the matter was left to the discretion of

the court, and if the leave was given, it only commanded that the party be put under condition for preventing obstruction of navigation or passage of fish, if the dam would be an obstruction. Would you say that leave to erect a mill would be void for that cause after the court exercised its discretion and judgment? I think not. But, if you could possibly say so in such case, you cannot in this instance, for the reason that the inquisition found and reported that the mill would not obstruct navigation or passage of fish. Surely the order of the court would not be void, if afterward it was found that the inquisition did not speak the truth.

"This view is expressly held in *Crenshaw v. State River Co.*, 6 Rand. 245, laying down that, as the law required the inquisition to report whether the passage of fish and navigation would be obstructed by the proposed mill, if it reported that the mill would not obstruct them, 'then leave is granted to erect the mill without any condition as to navigation' and that 'such grant, under such precautionary proceedings, is a perfect one, and vests in the grantee all the public rights to the stream, or so much thereof as is necessary to the full enjoyment of the mill erected under such order.'"

And in *Baxter v. Spuyten Duyvil etc. R. Co.*, 61 Barb. 428, an injunction to restrain the construction of a railroad, based on its being a nuisance, was refused because the road was being constructed under an order of the court, on notice to the commissioners of highways as required by the statute authorizing the construction of the railroad. Doubtless the same general rules prevail with respect to judicial authorizations which obtain with respect to legislative authorizations.

b. Effect of Authorization by Legislative Bodies.

1. **In General.**—In a general way it is said by the courts that a work or structure authorized by the legislature cannot be a public nuisance: *People v. Detroit etc. Plank Road*, 37 Mich. 195, 26 Am. Rep. 512; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, 86 A. 1. Dec. 252; *Danville etc. Co. v. Commonwealth*, 73 Pa. St. 29.

In *Knox v. Chaloner*, 42 Ala. 150, the court said: "All hindrances or obstructions to navigation without direct authority from the legislature are public nuisances: *Williams v. Wilcox*, 8 Ad. & E. 314. Where the legislature gives an individual the right of erecting and maintaining a dam upon navigable waters if the dam is so constructed as to impede the navigation beyond what the act authorizes, this renders the erection pro tanto a nuisance": See, also, *Benwick v. Morris*, 3 Hill, 621; *State v. Godfrey*, 12 Me. 361, to the same general effect. Hence, it is generally held that if a bridge, railroad, dam, canal, or other like improvement is constructed under legislative authority and strictly according to the requirements of the legislative authority, it will not constitute a public nuisance: *Miller v.*

New York City, 109 U. S. 385, 3 Sup. Ct. Rep. 228, 27 L. ed. 97; Easton v. New York etc. R. Co., 24 N. J. Eq. 49; Commonwealth v. Charlestown, 1 Pick. 180, 11 Am. Dec. 161; Milburn v. City of Cedar Rapids, 12 Iowa, 246; Dyer v. Curtis, 72 Me. 181; Hogg v. Zanesville Canal & Mfg. Co., 5 Ohio, 410; Butler v. State, 6 Ind. 165; Patterson v. City of Duluth, 21 Minn. 493; Stoughton v. State, 5 Wis. 291. Thus in Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984, it was said: "The mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."

The case of State v. Barnes, 20 R. I. 818, 40 Atl. 374, is also an instructive case on this question; the court in that case said: "We think it is competent for the general assembly to authorize and sanction an act or state of affairs which but for such authorization, would constitute a public nuisance; and that, when a person is authorized by law to engage in a particular business at a designated place, he is not liable to indictment and punishment for the consequences which may flow from the exercise of such authority, provided always that he keeps strictly within the terms of his license or permission and does only the things contemplated by the act under which he is licensed, in a careful and proper manner: 16 Am. & Eng. Ency. of Law, 1000, and cases in note 4; Wood on Nuisances, 1st ed., sec. 746, and cases cited; Commonwealth v. City of Boston, 97 Mass. 555; Garrett v. State, 49 N. J. L. 94, 693, 60 Am. Rep. 529, 7 Atl. 29. It is to be observed, however, as well stated in 16 American and English Encyclopedia of Law, page 1001, 'that courts look with jealousy upon such legislative indulgence, and hold the parties so favored to a strict observance of the limitations of their authority; and if their acts create what ordinarily would be a nuisance and what cannot be clearly shown to be the natural and probable method of proceeding, the authorized object could have been accomplished without creating the nuisance, they cannot rely for protection upon the statutory authority. It is considered that such consequences were not contemplated by the legislature.' Mr. Wharton, in his work on Criminal Law, volume 2, eighth edition, section 1424, states the law as follows: 'Lawful authority to do a particular thing is no defense to an indictment for doing such thing so negligently or badly as to create a nuisance. But if the license be strictly followed and a nuisance re-

suits, no prosecution can be maintained where there is no negligence or evil intent alleged on the part of the defendant. Hence, a gas company, duly chartered by an act of the legislature to supply gas to a city, cannot be convicted of nuisance when the acts complained of were necessary to the exercise of its trust, and were performed carefully and judiciously. The same distinction applies, *mutatis mutandis*, to railroads.' *People v. New York Gaslight Co.*, 64 Barb. 55, is an instructive case upon the question before us. There it was held that when the legislature has authorized a corporation to manufacture gas, and the company, in pursuance of such authority, has proceeded to erect gasworks, and to make and distribute gas therefrom, it is not liable to indictment for creating a nuisance by unwholesome smells, smokes, and stenches rendering the air corrupt and unwholesome, where it is conceded that the building and processes of the company are of the best, and that it has used due care and diligence in the business. In delivering the opinion of the court, Leonard, J., said: 'The power of the legislature is omnipotent, within constitutional limits. It is sufficient to authorize railroads to be run through crowded thoroughfares, with locomotives, causing great disturbance to the citizens who reside near them, and exposing their residences and property to constant danger of fire from the sparks emitted from the engines. If unauthorized by statute these acts would be a nuisance. The same power can authorize dams to be constructed and maintained for public purposes although they may render the common air we breathe unwholesome, producing thereby diseases and death in their vicinity. The good of the greatest number is regarded by the legislature as its justification for the extraordinary use of its power. If the railroad is carried on with the greatest skill and care, with every improvement and advantage known to science and experience, it is not a nuisance although many are injured in property and personal security: *Davis v. Mayor etc. of New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Rex v. Pease*, 4 Barn. & Adol. 30; *Harris v. Thompson*, 9 Barb. 350. It may be that private persons can maintain an action for damages, as in *Carhart v. Auburn Gaslight Co.*, 22 Barb. 297; but the people are barred by the act which the legislature have passed from making a public complaint, by an indictment for such a cause, while the defendants conduct their business with skill, science and care': See, also, *Quinn v. Lowell Electric Light Corp.*, 140 Mass. 106, 3 N. E. 204. To the same general effect are the cases of *Miller v. City of New York*, 109 U. S. 385, 3 Sup. Ct. Rep. 228, 27 L. ed. 971, *Butler v. State*, 6 Md. 165, and *Garrett v. State*, 49 N. J. L. 101, 60 Am. Rep. 529, 7 Atl. 29."

So, also, it is held that where the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent

that it can be fairly said to be an unwholesome and unreasonable law: *Murtha v. Lovewell*, 166 Mass. 391, 55 Am. St. Rep. 410, 44 N. E. 347. And it is also said that a license to maintain a nuisance, if granted by a board of supervisors, will not be permitted to substantially impair the rights of property holders: *Sullivan v. Boyer*, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655. But it is said that an act legalizing an existing nuisance in the street of a city is a mere license and revocable at pleasure where there is no consideration for it: *Reading v. Commonwealth*, 11 Pa. St. 196, 51 Am. Dec. 534. A nuisance cannot, it seems, be authorized by a contract between a municipality and a cemetery association to the injury of third persons: *Barrett v. Mt. Greenwood Cemetery Assn.*, 159 Ill. 385, 50 Am. St. Rep. 168, 42 N. E. 891, 31 L. R. A. 109.

2. Necessity for Legislative Permission to be Strictly Followed.—

As shown in the preceding subdivision the license or statute permitting the acts or things complained of as a nuisance must be strictly followed in order to prevent such acts or things from becoming a public nuisance. The court in *State v. Woodbury*, 67 Vt. 602, 32 Atl. 495, very pertinently observed: "The doctrine that the state cannot complain of a nuisance which results from the doing of something which it has authorized applies only when the nuisance is a necessary result of the authorized act. If a licensed business, which could have been carried on without becoming a nuisance is permitted to become one, the license will not bar an indictment. When licensed, the business is legalized if properly carried on. If not licensed, it is an offense against the statute, however it may be carried on. If it is not licensed and is so carried on as to be obnoxious to the rules of the common law, it is an offense against the common law as well as against the statute, and may be punished as such. If the clause which prescribes a forfeiture repeals anything, it repeals only so much of the common law as relates to the punishment. Where there is a repeal of this character, although the offender must be punished in accordance with the statute, he may be indicted under the common law."

Hence it may be said in a general way that an act or thing allowed by law cannot be a public nuisance if strictly within the permission of the statute: *Hinchman v. Paterson Horse B. Co.*, 17 N. J. Eq. 75, 8 Am. Dec. 252; *Commonwealth v. Kidder*, 107 Mass. 188. The case of *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421, is an illustration of the rule. It was there held, under an ordinance licensing houses of ill-fame, that a licensed house of ill-fame was not a public nuisance per se, but that whether it became such by reason of the indecent conduct and exposure of its inmates was a question of fact.

3. Distinction Between Legislative Authorization and Negligent Use of the Authorization.—As before indicated, there is a clear distinction between the careful and negligent conducting of a work authorized by statute. For instance, a license to conduct a rendering plant does not authorize a negligent and improper conduct of it amounting to a nuisance: *State v. Baines*, 20 R. I. 313, 40 Atl. 374; *State v. St. Louis Board of Health*, 16 Mo. App. 8. Hence it is said that the mere fact that a statute recognizes the legality of a certain occupation and makes provisions for its regulation does not legalize such occupation or prevent its abatement where it becomes a public nuisance, unless the statute expressly authorizes the conduct of the occupation in the manner alleged to constitute nuisance: *Woodruff v. North Bloomfield etc. Co.*, 18 Fed. 753, 779. It seems, however, that the legislature may, when deemed necessary for the public welfare, require that to be done which under the common law, would be regarded as a public nuisance, such as the sounding of bells or blowing of whistles by locomotives on approaching crossings: *Pittsburgh etc. Ry. v. Brown*, 67 Ind. 45, 33 Am. Rep. 73. But it is held that an act authorizing a person to build a dam on his own land upon a river which is a highway, merely protects him from an indictment for a nuisance for obstructing the river, for if, in building his dam, he overflows his neighbor's land he is still liable to an action therefor: *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201.

In other words, the rule appears to be that the legislature may free the person from any liability for the acts authorized as far as any prosecution or action by the state is concerned, but it cannot always relieve him from liability to third persons for injuries which he may cause to them by the acts so authorized.

In *Village of Pine City v. Munch*, 43 Minn. 342, 44 N. W. 197, 6 L. R. A. 763, in discussing the powers of legislative bodies in this respect, Justice Mitchell said: "It is suggested that this dam was erected by authority of law and that whatever is authorized by the legislature or its authority cannot be abated as a nuisance. This question is not raised by the demurrer, but if the fact be as claimed by the defendants, it might be a reason why the dam itself could not be abated but none why the defendants should be enjoined from so operating it as to create a public nuisance. If the legislature expressly authorizes that which must inevitably result in public injury, what would otherwise be a nuisance may be said to be legalized, but if they authorize an erection which does not necessarily produce such a result, but such result flows from the manner of construction or operation, the legislative license is no defense. In order to justify a nuisance by legislative authority, it must be the natural and probable result of the act authorized, so that it may fairly be said to be covered by the legislation conferring the power." In this connection see, also, *People v. New York Gaslight Co.*, 64 Barb. 55.

XV. Acts or Things Which Have Been Complained of as Constituting Public Nuisances.**a. Matters Affecting General Morals or the Good Order of the Community.****1. Acts or Conduct.**

A. Acts of an Indecent or Obscene Character.—Perhaps the majority of the acts which offend common decency and are injurious to public morals, though coming within the general idea of a common nuisance, are not regarded as such by the courts, and when not regulated by statute, are considered as belonging to that numerous class of offenses known to the common law under the omnibus title of misdemeanors: See *State v. Rose*, 32 Mo. 560; *State v. Roper*, 1 Dev. & B. 208; *Moffit v. State*, 43 Tex. 346; *Miller v. People*, 5 Barb. 203; *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182; *State v. Gooch*, 7 Blackf. 468; *Dameron v. State*, 8 Mo. 494; *State v. Fore*, 1 Ired. 378; *State v. Poteet*, 8 Ired. 23; *State v. Moore*, 1 Swan, 136; *State v. Cagle*, 2 Humph. 414; *Grisham v. State*, 2 Yerg. 589; *Anderson v. Commonwealth*, 5 Rand. 627, 16 Am. Dec. 776; *Rex v. Talbot*, 11 Mod. 415; *Claxton's Case*, 12 Mod. 566.

Likewise, with respect to the publishing or selling of obscene books, prints, or pictures, the courts seem to regard the offense, not in the nature of a common nuisance, but as an offense tending to corrupt youth, though of course in most cases such prosecutions are based on some statutory enactment: See *Commonwealth v. Holmes*, 17 Mass. 336; *Commonwealth v. Sharpless*, 2 Serg. & R. 91, 7 Am. Dec. 632; *State v. Hanson*, 23 Tex. 232. There is, however, a dictum in *Ex parte Foote*, 70 Ark. 12, 91 Am. St. Rep. 63, 65 S. W. 706, to the effect that such violations of public decency are common nuisances, citing 1 Wood on Nuisances, sections 57, 65, 68.

It has, however, been held that the standing of jacks and stallions near, and in full view of, an inhabited dwelling is a nuisance: *Hayden v. Tucker*, 37 Mo. 214; *Farrell v. Cook*, 16 Neb. 483, 49 Am. Rep. 721, 20 N. W. 720. And ordinances making the showing or exhibiting of a stud horse in a town a public nuisance were sustained in *Nolin v. Mayor of Franklin*, 4 Yerg. 163. Likewise, an ordinance prohibiting the keeping of a jackass within the municipal limits was also sustained, not only on account of the use of the animal for breeding purposes, but also because of his manner of making himself heard by the community: *Ex parte Foote*, 70 Ark. 12, 91 Am. St. Rep. 63, 65 S. W. 706.

It will be observed from a close reading of the cases involving the question of morals that acts of an immoral nature were regarded as a class somewhat separate and apart from common nuisance, although where the acts also tended to annoy by shocking the moral sen-

sibilities of the community they were regarded in the category of common nuisances.

B. Common Scolding or Eavesdropping.—The offense of being a common scold is a common nuisance under the common law, and seems to have applied solely to the female sex. In *Queen v. Foxby*, 6 Mod. 213, the court observed that scolding once or twice is no great matter, for scolding alone is not the offense, but it is the frequent repetition of it to the disturbance of the neighborhood which makes it a nuisance.

Although it has been contended that the offense is obsolete in the United States, still its existence as an offense has been recognized in several cases: See *Baker v. State*, 53 N. J. L. 45, 20 Atl. 858; *Greenwault's Cases*, 4 City Hall Records (N. Y.), 174; *Commonwealth v. Mohn*, 52 Pa. St. 243, 91 Am. Dec. 153; *James v. Commonwealth*, 13 Serg. & R. 220; *United States v. Royal*, 3 Cranch C. C. (U. S.) 620, Fed. Cas. No. 16,202; the court in the two cases last cited, indulging in a very exhaustive and learned discussion of the origin and nature of the offense. The conclusion of the courts seems to be that the offense is not obsolete, though from feelings of chivalry, aided by an observation of Chief Justice Holt in *Queen v. Foxby*, 6 Mod. 213, to the effect "that ducking would rather harden than cure her, and if she were once ducked she would scold on all the days of her life," the courts seem to agree that the ancient punishment of the offense by ducking is obsolete. And the American cases also contain some dicta to the effect that in accordance with the custom of our laws treating both sexes alike, that the offense should be made to apply to the male members of the community as well as the fair sex. The offense charged in *Medford v. Levy*, 31 W. Va. 649, 13 Am. St. Rep. 887, 8 S. E. 302, 2 L. E. A. 368, seems to have been quite similar to that of being a common scold.

With respect to eavesdropping, Blackstone says "that eavesdroppers, or such as listen under walls, or windows, or the eaves of houses to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and indictable as such": 4 Blackstone's Commentaries, 168. See *State v. Williams*, 2 Tenn. 108; *State v. Pennington*, 3 Head, 299, 75 Am. Dec. 771.

C. Making Loud Outcries, Singing Ribald Songs or Using Profanity in Public.—Loud, profane, or obscene outcries and exclamations in a public street in the night-time have been held to constitute public nuisances: *Commonwealth v. Oaks*, 113 Mass. 8; *Commonwealth v. Smith*, 6 Cush. 80; *Commonwealth v. Foley*, 99 Mass. 497. And it was even held in Massachusetts that they would constitute a public nuisance, though those who heard the person making them were not annoyed and went so far as to encourage their continuance: *Commonwealth v. Harris*, 101 Mass. 29. So, also, the singing of a ribald song

in a loud and boisterous manner on the public streets in the presence of numerous persons and continued for ten minutes was held to be a public nuisance, though the particularly objectionable stanzas of the song were not repeated: *State v. Toole*, 106 N. C. 736, 11 S. E. 168.

And in North Carolina and Tennessee, it seems that loud and continued cursing and swearing constitutes a common nuisance. In this connection see the discussion as to the duration or repetitions of the profanity necessary to constitute the common nuisance in the following cases: *State v. Jones*, 9 Ired. 38; *State v. Kirby*, 1 Murph. 254; *State v. Ellar*, 1 Dev. 267; *State v. Powell*, 70 N. C. 67; *State v. Chrisp*, 85 N. C. 528, 39 Am. Rep. 713; *State v. Baldwin*, 1 Dev. & B. 195; *State v. Graham*, 3 Sneed, 134; *Gaines v. State*, 75 Tenn. 410, 40 Am. Rep. 64.

D. Prizefighting or the Playing of Baseball.—Participating in a professional prizefight under the Marquis of Queensbury's rules is regarded as a public nuisance: *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280. The game of baseball is held not to constitute a nuisance per se, though if it were permitted to degenerate into a mere rallying place for drunkards and rowdies, it would be likely to become a public nuisance: *Alexander v. Tebeau* (Ky.), 71 S. W. 427. But see *People v. Monteverde*, 43 Hun, 447, where the game was played on Sunday.

E. Disturbing Public Worship or Desecrating the Observance of Sunday.—The running of cars through a town on Sunday with the result of disturbing religious worship was held not to constitute a public nuisance: *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. St. 401. The observance of Sunday as a day of rest or of public worship is generally regulated by local laws. The subject has, however, been discussed from the standpoint of the common law. Thus it has been held that hunting or fishing on Sunday may become indictable as a public nuisance if pursued to a certain extent: *Gunter v. State*, 69 Tenn. 129. Likewise, working at a person's trade, as, for instance, at blacksmithing, has also been held to constitute a public nuisance under certain circumstances: *Parker v. State*, 84 Tenn. 470, 1 S. W. 202. But it has been held that running a barber-shop on Sunday is not an indictable nuisance: *State v. Lorry*, 7 Baxt. 95, 32 Am. Rep. 555.

2. Places or Institutions.

A. Theaters, Show Places or Places for Holding Prizefights.—In *King v. Moore*, 3 Barn. & Adol. 184, 188, Tauton, J., said: "In Hawkins' Pleas of the Crown, b. 1, c. 75, secs. 6, 7, it is laid down that all common stages for rope dancers and all common gaming-houses, are nuisances in the eye of the law, 'not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient

to the neighborhood. Also it hath been holden that a common play-house may be a nuisance if it draw together such numbers of coaches, or people as prove inconvenient to the places adjacent.' "

Likewise it was said in *Pike v. Commonwealth*, 2 Duvall (Ky.), 89, that: "The common law, which sanctions prudent theatrical performances denounces as unlawful such as are demoralizing, licentious, or obscene." In this connection see, also, *Jocko v. State*, 22 Ala. 73.

So, also, with reference to the maintenance of a place for the holding of prizefights, the court in *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280, in answer to the question whether the use of land or a building for the maintenance of prizefighting was a nuisance, said: "In *Wood on Nuisances*, third edition, section 68, the author says: 'A public exhibition of any kind that tends to the corruption of morals, or to a disturbance of the peace, or of the general good order or welfare of society, is a public nuisance. Under this head are included all puppet shows, legerdemain, and obscene pictures, and all exhibitions, the natural tendency of which is to pander to vicious and dissolute members of society.' That a prizefight is an exhibition of the character here described and consequently a public nuisance, there can be no doubt; and if so, the use of a theater for prizefighting is such a nuisance. Therefore, the legislatures of many of the states have enacted laws for their suppression, realizing, no doubt, that the remedies afforded by the general laws were not adequate to that end; and the courts have been uniform in upholding the statutes enacted. Thus in *Sullivan v. State*, 67 Miss. 346, 7 South. 275, the supreme court of Mississippi said: 'We think, however, that the evil sought to be protected against by the statute is the debasing practice of fighting in public places, or places to which the public or some part of it, is admitted as spectators.'

"Such a meeting as would have been held in the Auditorium, in Louisville, to witness the prizefight between McGovern and Corbett, if that fight had occurred, would doubtless have attracted many of the better and law-abiding class of citizens, curious to see such a spectacle as a prizefight; but for every such reputable citizen thus attending there would have been present a dozen gamblers, confidence men, bunco steerers, or pickpockets, gathered from all parts of the United States, men of idle, vicious, and criminal habits and practices, whose business is to prey upon the public in some form or other, and many of them would remain in the community after the combat to ply their nefarious callings. Such an assembly would easily be led into a riot or other unlawful disturbance of the public peace. In addition to the evils suggested, there would be the contaminating effect of such a meeting upon the youth of the city and state, which might prove of incalculable injury to their morals and future welfare. Such a gathering, too, would demand increased vigilance in the protection of the property of the city and its inhabitants, be a menace

to good order, and disturb the peaceful pursuits and happiness of citizens who would be unwilling to patronize such an enterprise."

B. Houses of Ill-fame or of Assignation, Disorderly Places, Dance-halls, Disorderly Saloons or Places Where Liquor is Illegally Sold.—

It is said in Wood on Nuisances, section 29, that "a house of ill-fame, or bawdy-house, as it is more commonly called in the law, is a public nuisance, and the keeper thereof may be indicted therefor whether the house is located in a city or a forest"; citing 1 Hawkin's Pleas of the Crown, 362; 1 Rolle's Abridgment, 109; Regina v. Williams, 1 Salk. 384; Hachney v. State, 4 Ind. 494; People v. Rowland, Cr. Rec. (N. Y.) 286; State v. Maurer, 7 Iowa, 406; Commonwealth v. Howe, 13 Gray, 26; Commonwealth v. Davis, 11 Gray, 48. And to the same effect see, also, Blagen v. Smith, 34 Or. 394, 56 Pac. 292, 44 L. R. A. 522; Ingersoll v. Rousseau, 35 Wash. 92, 26 Pac. 513; note to Marsan v. French, 48 Am. Rep. 274. but see, also, Givens v. Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421, as to the effect where such a house is maintained under a municipal license. So, also, a house of assignation is regarded as a public nuisance: People v. Rowland, 1 Wheel. C. C. 286.

Likewise, disorderly houses are regarded as common nuisances: Hunter v. Commonwealth, 2 Serg. & R. 298; State v. Bailey, 21 N. H. 343. And the keeping of a common tippling-house in which idle and dissolute persons are encouraged to assemble and are permitted to drink, swear, quarrel and shout by day and night to the disturbance and annoyance of the neighborhood is regarded as a common nuisance: State v. Bertheol, 6 Blackf. 474, 39 Am. Dec. 442; Bloomhuff v. State, 8 Blackf. 205; State v. Buckley, 5 Harr. 508; Smith v. Commonwealth, 6 B. Mon. 21; Commonwealth v. Stewart, 1 Serg. & R. 342; Wilson v. Commonwealth, 12 B. Mon. 21. And places where intoxicating liquor is illegally sold are also regarded as common nuisances, although the statutes, as a general rule, provide for such cases by either declaring such places to be common nuisances or making such acts a specific crime: See State v. Waynick, 45 Iowa, 516; Commonwealth v. McDonough, 13 Allen, 581; Meyer v. State, 41 N. J. L. 6; State v. Marston, 64 N. H. 603, 15 Atl. 222; State v. Stanley, 84 Me. 555, 24 Atl. 983; State v. McIntosh, 98 Me. 397, 57 Atl. 83; State v. Fraser, 1 N. Dak. 425, 48 N. W. 343; State v. Hoxsie, 15 R. I. 1, 2 Am. St. Rep. 838, 22 Atl. 1059; State v. Hughes, 16 R. I. 403, 16 Atl. 911; State v. Wacker, 71 Wis. 672, 38 N. W. 189.

And a theater which is allowed to run in a disorderly manner also constitutes a common nuisance: People v. Rowland, 1 Wheel. C. C. 286. And likewise a saloon at which persons are allowed to play pool and bagatelle for the drinks has been held to be a nuisance both under the common law and the code: People v. Cutler, 28 Hun, 465, But public picnics and public dances are not per se nuisances, though they may become public nuisances from being conducted in such a

manner as to produce annoyance: *Village of Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677.

C. Bowling Alleys, Billiard-rooms, Gaming-houses and Gambling Appliances.—A house or place may become a public nuisance in two ways—namely, from the end or purpose for which it is erected and from the manner in which the place is conducted. The end or purpose for which the house is designed will render it a public nuisance if it be such as of necessity is injurious to public morals, peace, or health: *State v. Hall*, 32 N. J. L. 158. In a few of the earlier decisions, bowling-alleys kept for hire were regarded as public nuisances, because it was alleged they served no useful purpose, and had, it was claimed, a bad tendency: See *Tanner v. Trustees*, 5 Hill, 121, 40 Am. Dec. 337; *State v. Haines*, 30 Me. 65. But in *Updike v. Campbell*, 4 E. D. Smith, 570, Justice Woodruff, though following the precedent of *Tanner v. Trustees*, 5 Hill, 121, 40 Am. Dec. 337, questioned the correctness of the rule there announced. And in *State v. Hall*, 32 N. J. L. 158, the court in a very exhaustive opinion, in which it reviewed the English decisions involving the principles of law forming the basis of nuisances *per se*, held that bowling-alleys kept for hire were not nuisances *per se*, though of course admitting that they might be so conducted as to become public nuisances. See, also, the recent case of *Harrison v. People*, 101 Ill. App. 224, to the same effect.

Keeping a billiard-room, without allowing any noise to disturb the neighborhood and without allowing gaming is not a nuisance at common law: *People v. Sergeant*, 8 Cow. 139.

Common gaming-houses are regarded as public nuisances at common law: *King v. Dixon*, 10 Mod. 336; *People v. Sergeant*, 8 Cow. 139; *State v. Layman*, 5 Harr. (Del.) 510; *Vauderworker v. State*, 13 Ark. 700; *State v. Doon* (Ga.), R. M. Charl. 1; *Hill v. Pierson*, 45 Neb. 503, 63 N. W. 835; *Lord v. State*, 16 N. H. 325, 41 Am. Dec. 729; *United States v. Ismenard*, Fed. Cas. No. 15,450, 1 Cranch C. C. 150. And it is said that the term "nuisance" at common law includes both gambling devices and lotteries: *In re Smith*, 54 Kan. 702, 39 Pac. 707. Nickle-in-the-slot machines in a cigar store have been declared to be gambling devices and nuisances under the statute: *Lang v. Merwin*, 99 Me. 486, 105 Am. St. Rep. 293, 59 Atl. 1021. Likewise a house or place where persons habitually assemble to bet on horseraces has been declared to be a common nuisance: *Bollinger v. Commonwealth*, 98 Ky. 574, 35 S. W. 553.

b. Matters Affecting Peace and Quiet, Property or General Rights as a Member of the Community.

1. Noisy Acts, Businesses or Occupations.

A. Keeping of Noisy Animals.—The keeping of a jackass was regarded as such a public nuisance as could be prohibited by an or-

dinance in *Ex parte Foote*, 70 Ark. 12, 91 Am. St. Rep. 63, 65 S. W. 706, although his use for breeding purposes was an element of the case; the court saying: "As a rule, a jack is kept for one purpose only, and that is, the propagation of his own species and mules. He has a loud, discordant bray, and, as counsel say, frequently 'makes himself heard, regardless of hearers, occasions or solemnities.' He is not a desirable neighbor. The purpose for which he is kept, his frequent and discordant brays, and the association connected with him bring the keeping of him in a populous city or town 'within the legal notion of a nuisance.' "

B. Ringing of Bells, Maintenance of Roller Skating Rinks, Merry-go-rounds, Blacksmith-shops and the Like.—The habitual ringing of bells at early hours has been declared to constitute a nuisance, but the question having arisen in suits for restraining orders against such ringing, it is not clear whether they were deemed public nuisances: *Soltan v. De Held*, 2 Sim., N. S., 133, 21 L. J. Ch. 153, 16 Jur. 320; *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519, and note. The making of such a noise in the night-time with a speaking trumpet as to disturb the neighborhood was held to constitute a public nuisance: *Rex v. Smith*, 1 Strange, 704. The maintenance of a merry-go-round, run by steam engine, the whistle of which blew every few minutes, accompanied by a band and attended by a large, noisy, and boisterous crowd till after 10 o'clock at night, disturbing some of the people living near it, was declared to be a public nuisance: *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906. But Justices Dent and Brannon filed vigorous dissenting opinions.

A roller skating rink was regarded as a nuisance in *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241, and was enjoined, the court exhaustively reviewing various cases on the subject of noise.

Most of the cases in which the subject of blacksmith-shops have been questioned as constituting nuisances, have been suits by persons who claimed to have been specially injured. The courts seem to universally state such places are not nuisances per se, but may, of course, become nuisances by the manner in which they may be conducted: See *Bowen v. Mauzy*, 117 Ind. 258, 19 N. E. 526; *Fancher v. Grass*, 60 Iowa, 505, 15 N. W. 302; *Marrs v. Fiddler* (Ky.), 69 S. W. 953; *Norcross v. Thoms*, 51 Me. 503, 81 Am. Dec. 588; *Doellner v. Tynan*, 38 How. Pr. 176; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *Chambers v. Cramer*, 49 W. Va. 395, 38 S. E. 691, 54 L. R. A. 545. Likewise, planing-mills and cotton-gins are held not nuisances per se: *Dorsey v. Allen*, 85 N. C. 358, 39 Am. Rep. 704. And woodworking plants are not necessarily public nuisances: *New Orleans v. Lagasse*, 114 La. 1055, 38 South. 828. Flouring-mills in cities are not nuisances per se: *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378. So, also, stationary steam engines in midst of city, but not interfering with the safety or convenience of the public, are not nuisances: *Baltimore v. Radecke*,

49 Md. 217, 33 Am. Rep. 239. But it has been held that the maintenance of a coal-shed on the right of way of a railroad in a populous part of the city which disturbs the neighborhood by its noise and dust is a public nuisance: *Wylie v. Elwood*, 134 Ill. 281, 23 Am. St. Rep. 673, 25 N. E. 570, 9 L. R. A. 726. And in like manner it has been held that the screening of large quantities of coal in a city coal-yard is a public nuisance: *Commonwealth v. Mann*, 4 Gray, 213.

2. Erection of "Spite Fences" or Like Structures.—The courts do not seem to regard the maintenance of a high fence, erected for spite and with malice, and with no other purpose than to shut out the light and air from a neighbor's window, as a public nuisance, though some courts regard it as a private nuisance, while others regard it as an act within the legal rights of the person erecting the fence: *Flaherty v. Moran*, 81 Mich. 52, 21 Am. St. Rep. 510, 45 N. W. 381, 8 L. R. A. 183. In this general connection, see *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, 2 L. R. A. 81; *Burke v. Smith*, 69 Mich. 380, 37 N. W. 838; *Kuzniak v. Kosminski*, 107 Mich. 444, 61 Am. St. Rep. 344, 65 N. W. 275; *Bordeaux v. Greene*, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218; *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461; *Metzger v. Hochrein*, 107 Wis. 267, 81 Am. St. Rep. 841, 83 N. W. 308, 50 L. R. A. 305.

3. Erection of Unsightly Buildings, Hospitals, Pethouses, Cemeteries, Billboards, or Places of Entertainment in Strictly Residence Districts.—Matters that are annoyances merely because disagreeable to the sight, such as unsightly buildings, business places, or machinery shops, amidst a fashionable residence district are not considered as such annoyances as amount to a public nuisance: *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Quintini v. City of Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62, 1 South. 625; *Ex parte Lacey*, 108 Cal. 326, 49 Am. St. Rep. 93, 41 Pac. 411, 38 L. R. A. 640; *Rodenhausen v. Craven*, 141 Pa. St. 546, 23 Am. St. Rep. 306, 21 Atl. 774. A fire-engine house was held not to be a nuisance per se, though it might become one: *Van De Vere v. Kansas City*, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695. But a depot for the landing of immigrants near costly private residences in New York city was held a public nuisance, though it appears that the danger to health from immigrants afflicted with contagious diseases was an element of the case: *Brower v. Mayor etc. of New York*, 3 Barb. 254. See *Thompson v. Paterson*, 9 N. J. Eq. 624, where the question of a poorhouse and workhouse was also raised. A brewery has also been held not to be a nuisance per se: *O'Reilly v. Perkins*, 23 R. I. 364, 48 Atl. 6. A mere hospital is not prima facie a nuisance: *Bessonies v. City of Indianapolis*, 71 Ind. 189. But a pethouse at which a person suffering from leprosy is kept seems to be regarded as a public nuisance where it is near an

inhabited locality: *Baltimore v. Fairfield Improvement Co.*, 87 Md. 352, 67 Am. St. Rep. 344. See, also, *Haag v. Commrs. of Vanderburgh Co.*, 60 Ind. 511, 28 Am. Rep. 654, to the same general effect. A cemetery near dwellings is not a nuisance per se: *Monk v. Packard*, 71 Me. 309, 36 Am. Rep. 315; *Clark v. Lawrence*, 59 N. C. 83, 78 Am. Dec. 241; *Lake View v. Rosehill Cemetery*, 70 Ill. 191, 22 Am. Rep. 71; *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14; *Brasch v. Cemetery Assn. (Neb.)*, 95 N. W. 646. And see generally on the subject, *Ellison v. Commissioners*, 58 N. C. 57, 75 Am. Dec. 430; *Lowe v. Prospect Hill Cemetery Assn.*, 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237.

Billboards and advertisements upon private lands are not nuisances per se. In this connection, see *City of Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 75 L. R. A. 230; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 118, 11 N. E. 929; *Longmaid v. Reed*, 159 Mass. 409, 34 N. E. 593; *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 108 Am. St. Rep. 494, 74 N. E. 601, 69 L. R. A. 817; *City of Rochester v. West*, 164 N. Y. 510, 79 Am. St. Rep. 659, 58 N. E. 673; *Gunning System v. City of Buffalo*, 75 App. Div. 31, 77 N. Y. Supp. 987; *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460.

The construction and maintenance of an automobile station or garage for the entertainment of chauffeurs and their friends on the boulevard at Rockaway Beach in a neighborhood occupied by expensive summer residences does not amount to a common-law nuisance: *Stein v. Lyon*, 91 App. Div. 593, 87 N. Y. Supp. 125.

4. **Matters Enhancing Risk from Fire in the Neighborhood.**—In *New Orleans v. Lagasse*, 114 La. 1055, 38 South. 828, it was urged that a certain wooden building in the city was a public nuisance, but the court said: "Increase in the rate of insurance also scarcely presents a question which the city can press under the allegation that it is a public nuisance. The question raises a private issue. While it is commendable enough on the part of the city to seek to protect all her inhabitants, yet it would venture beyond municipal power and ability, were it to undertake to prevent private wrongs and lessen inequalities growing out of the enterprise of insurance."

And likewise in *Benton v. Elizabeth*, 61 N. J. L. 411, 39 Atl. 683, affirmed in 61 N. J. L. 693, 40 Atl. 1132, it was alleged that an oil pipe line was a nuisance per se, but the court observed: "On this point it is enough to say that the testimony does not sustain the allegation of fact. The existence of the pipe line may perhaps enhance the rates of insurance upon property in the vicinity, but that result would follow from the presence of various other businesses which would nevertheless be entirely legal. It does not constitute reason enough

for the suppression of an occupation otherwise lawful: *Butler v. Rogers*, 9 N. J. Eq. 487; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Courter v. Board of Health*, 54 N. J. L. 325, 23 Atl. 949; *Rhodes v. Dunbar*, 57 Pa. St. 274, 98 Am. Dec. 221."

And it was held in Pennsylvania that a wooden building, erected contrary to law, is not per se a public nuisance, but that it may become such by the manner in which it is used or allowed to be used: *Fields v. Stokley*, 99 Pa. St. 306, 44 Am. Rep. 109. But in California it was held that a wooden building, within the fire limits of a town, having an iron pipe passing through the ceiling and roof, which pipe connected with an iron stove in which a wood fire was maintained, was a menace to the safety of the town by fire, and that it was such a public nuisance in fact as could be denounced by an ordinance: *People v. Wing* (Cal.), 81 Pac. 1104.

5. **Exposing Cattle, Horses or Sheep Afflicted With Contagious or Infectious Diseases.**—In *State v. Missouri Pac. Ry. Co.* (Kan.), 81 Pac. 212, the validity of a statute declaring the maintenance of a passageway or trail for the driving of cattle from one state to another to be a nuisance was in issue. The statute was directed principally against the importation of cattle afflicted with Texas, splenic or Spanish fever. The court in sustaining the validity of the statute observed: "The objection that the acts of defendant below in maintaining the cattle trail did not constitute a public nuisance is ill-founded. To place in jeopardy the animal industry of a state where stock-raising is one of the principal sources of wealth is a matter of concern to all. A menace of such nature should be met with prompt preventive measures by those charged with the duty of enforcing the laws."

It was intimated in *Mills v. New York etc. R. Co.*, 2 Rob. (N. Y.) 326, that the taking of a horse afflicted with glanders or other infectious diseases into public places or common watering places was a nuisance.

But in *Fisher v. Clark*, 41 Barb. 329, a suit for damages for the communication of the scab by defendant's sheep, the court said: "It could be no violation of the plaintiff's rights for the defendant to occupy his own land in his own way, unless he created a nuisance thereon. Pasturing sheep having an infectious disease was not a nuisance. It was and could be no injury to the plaintiff unless he suffered his sheep to take the contagion by permitting them to come into contact with the defendant's sheep. Each party had a right to use his own field to pasture his sheep. If the defendant's sheep had infectious disease, infectious only to sheep, he had the same right to have the same in his own field as the plaintiff had to permit his sheep to run in the adjoining field, exposed to take such disease. A person sick with a contagious disease is not obliged to abandon his

own house to prevent the spread of such disease. A house occupied by persons having an infectious disease is not a nuisance: *Boom v. City of Utica*, 2 Barb. 104. It is not pretended that the disease of the defendant's sheep was a nuisance. They did not render the enjoyment of life or property uncomfortable (*Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254), or endanger the health of the neighborhood: 9 Paige, 575; *Brady v. Weeks*, 3 Barb. 157. Nor were they offensive to the senses, like a slaughter-house, or gasworks or swine styes or lime kiln, or a livery-stable or a tannery." The case of *Barnum v. Vandusen*, 16 Conn. 200, was also one respecting damages from sheep afflicted with the hoof distemper, but the question of nuisance does not seem to have been raised.

6. **Allowing the Growth of Cocklebur or Other Noxious Weeds.**—The case of *Harndon v. Stultz*, 124 Iowa, 734, 100 N. W. 851, was for both damages and injunction because of defendant allowing cocklebur and other noxious weeds to grow in large quantities upon his land in close proximity to the division line between the farms, whereby the seeds of such weeds were cast upon plaintiff's land. The pleadings of the case were not in such condition as to distinctly raise the issue of whether such acts constituted any nuisance. The court observed: "Plaintiff also seeks in this action an injunction 'restraining the continuance of the cocklebur seeds and weeds blown and drifted upon his land.' The proposition is unique, to say the least. It is not suggested that the growing by one upon his own land of cocklebur and weeds is without legal right, or that in law the field of defendant constituted a nuisance. Counsel does not cite any authority for the granting of an injunction in a case such as plaintiff presents, and we know of none."

7. **Overflowing Land of Others with Water or Mining Debris.**—The overflowing of the land of riparian owners with mining debris from auriferous gravel deposits is regarded as a public nuisance: See *Woodruff v. North Bloomfield etc. Co.*, 18 Fed. 753, 9 Saw. 441; *People v. Gold Run Ditch & Min. Co.*, 66 Cal. 138, 4 Pac. 1150. In this general connection, see, also, *McCarthy v. Gaston Ridge, Mill & Min. Co.*, 144 Cal. 542, 78 Pac. 7; *Chessman v. Hale* (Mont.), 79 Pac. 254.

8. **Matters Affecting Fishing Rights of the Public.**—It seems that the dominion of the state for the purpose of protecting its sovereign rights in the fish within its waters is not confined to navigable waters, but extends to non-navigable streams as well: *People v. Truckee Lumber Co.*, 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581. Under the common law it seems that the obstruction of the passage of fish up and down rivers was regarded as a public nuisance: *Commonwealth v. Chapin*, 5 Pick. 199, 16 Am. Dec. 336; *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382. Hence it is held that the legislature has power to declare that any net found, or any other means or device for taking or capturing fish, set, put,

floated, had, found or maintained in or upon any of the waters of the state or upon the shores or islands in any waters of the state in violation of existing or hereafter enacted statutes for the protection of fish, shall be a public nuisance: *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134. And likewise the placing of fish traps or nets in the channel of a river to such an extent as to render it impossible for the public to pursue the common right of fishery is regarded as a public nuisance: *Morris v. Graham*, 16 Wash. 343, 58 Am. St. Rep. 33, 47 Pac. 752. So, also, the placing of deleterious refuse in streams, thereby killing the fish therein, is said to constitute a public nuisance under a code provision, which practically defines the common-law idea of a public nuisance: *People v. Truckee Lumber Co.*, 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581. In this general connection, see, also, *Kuehn v. City of Milwaukee*, 92 Wis. 263, 65 N. W. 1030.

c. Matters Affecting General Health or Comfortableness.

1. **Fouling of Water Used for Domestic Purposes by Discharges of Sewage, Privy Contents and Other Deleterious Substances.**—In *Commonwealth v. Yost*, 197 Pa. St. 171, 46 Atl. 845, the defendant was indicted for discharging certain sewage and privy contents into a creek which formed part of a municipal water supply. The court observed: "If the public, having a right to take from this stream pure and unpolluted water, found in it the germs of disease, coming from the cesspool of the defendant, which he maintained on a tributary to the stream, his offense would be a public one, for which he would be properly indicted. The wrong would be against the whole community, as a community—not simply against an individual or certain individuals, however numerous—and ought to be punished as a crime. If the public have a right to receive pure water through the agency of a corporation legally authorized to take it from a stream, he who pollutes it offends against the public. If, on the other hand, the waters of a stream, in which riparian owners alone have an interest, be polluted, the wrong or injury is a private one, for which the individual or individuals injured may have redress; and this is true whether the riparian owner be a private person or a water company which does not take the water from the stream under the right of eminent domain."

Hence, in accordance with this rule, it has been held that the discharging of juices and refuse from a tomato cannery into a reservoir from whence it passes into a small stream, making the stream offensive and dangerous to public health, is a public nuisance: *Butterfoss v. Board of Health*, 40 N. J. Eq. 325. And urinating in a spring near a public highway, from which travelers are accustomed to drink, is a public offense within the statutory definition of a nuisance: *State v. Taylor*, 29 Md. 517. The pollution of a stream by emptying of sewage into it, thereby rendering it unfit for domestic

purposes or for cattle, and causing noxious odors, is a public nuisance: *Nolan v. City of New Britain*, 69 Conn. 668, 38 Atl. 703.

And the permitting of noisome accumulations of filth at the outlet of a public sewer is a public nuisance, even though the city exercised its best judgment in the adoption of the sewerage system: *State v. City of Portland*, 74 Me. 268, 43 Am. Rep. 586.

The discharge of privy vaults into waters used for domestic purposes by any considerable number of people constitutes a public nuisance: *Commonwealth v. Roberts*, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400; *Board of Health v. Casey*, 3 N. Y. Supp. 399; *Commonwealth v. Yost*, 197 Pa. St. 171, 46 Atl. 845; *Trevett v. Prison Assn.*, 98 Va. 332, 81 Am. St. Rep. 727, 36 S. E. 373, 50 L. R. A. 564. With respect to the pollution of water used for domestic purposes, see, as bearing on the subject: *Mayor of Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *Smith v. City of Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401, 27 Am. Rep. 711; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, 6 Atl. 453; *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828; *State v. Mitchell*, 47 W. Va. 739, 35 S. E. 845.

2. **Dams, Pools, Ponds, or Other Places Producing Noxious Exhalations.**—A dam which causes water to become stagnant and corrupt the air is regarded as a public nuisance: *People v. Pelton*, 36 App. Div. 450, 55 N. Y. Supp. 815, affirmed in 159 N. Y. 537, 53 N. E. 1129; *Neal v. Henry, Meigs*, 17, 33 Am. Dec. 125; *Douglass v. State*, 4 Wis. 387. The maintenance of a pond producing smells and stenches rendering the enjoyment of life and property in the community uncomfortable is a public nuisance, even though it causes no sickness: *State v. Rankin*, 3 S. C. 438, 16 Am. Rep. 737. And the lowering of a pond so as to leave on the shore slime and offensive vegetable matter detrimental to public health is regarded as a public nuisance: *Attorney General v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361. Likewise a sewer from a hotel carrying off foul water and allowed to become so out of repair as to throw its contents on adjacent property causing sickness, discomfort, and inconvenience is a nuisance: *Adams Hotel Co. v. Cobb*, 3 Ind. Ter. 50, 53 S. W. 478. The maintenance of a tow-path in so careless and unskillful a manner that the water from the canal escaped through the locks and formed stagnant pools producing miasma, is an indictable nuisance: *Delaware Division Canal Co. v. Commonwealth*, 60 Pa. St. 367, 100 Am. Dec. 570. But a railroad embankment causing the accumulation of surface water after rains is not necessarily a nuisance: *Baltzger v. Carolina Midland Ry.*, 54 S. C. 242, 71 Am. St. Rep. 789, 32 S. E. 358. Hitching-posts which by reason of the accumulation of filth create a stench, draw flies, and become a menace to public health constitute a public nuisance: *Mercer County v. Harrodsburg (Ky.)*, 66 S. W. 10.

3. **Allowing Accumulation of Garbage or Dead Animals.**—The dumping of garbage, stable manure, and other refuse near dwelling-houses, causing malaria and fevers, was regarded as a public nuisance though the suit was for the special injuries suffered, the court refusing to go into the question whether malaria germs were transmitted by the wind, mosquitoes, or other modes of locomotion known to the medical specialists: *Percival v. Yonsling*, 120 Iowa, 451, 94 N. W. 913. Dead bodies of animals are not public nuisances unless they in some manner are hurtful to public health: *Richmond v. Caruthers*, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005.

4. **Maintenance of Unsanitary Tenements or Filthy Houses.**—In *Meeker v. Van Rensselaer*, 15 Wend. 397, it was held that a dwelling-house divided into small apartments and inhabited by a very large number of very poor people and maintained in a filthy condition, is a public nuisance during an epidemic of cholera. So, also, in *State v. Purse*, 4 McCord (S. C.), 472, a very filthy house was held to constitute a public nuisance.

5. **Selling of Diseased Meats or Provisions.**—The selling of diseased meats or provisions seems to be regarded as an offense in the nature of a common nuisance though some of the decisions treat it as being more of the nature of a specific offense at the common law: *State v. Smith*, 3 Hawks (N. C.), 378, 14 Am. Dec. 594. In this connection see, also, *State v. Norton*, 2 Ired. 40; *Goodrich v. People*, 19 N. Y. 574.

6. **Person Afflicted with Contagious Disease as a Public Nuisance.** In *Boom v. City of Utica*, 2 Barb. 104, 109, the court said: "We cannot admit that a person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding-house, is a nuisance. It has indeed been held in a case reported in 4 Maule & S. [*Rex v. Vautaudillo*], 73, that an indictment for nuisance would lie against a person 'for knowingly, unlawfully, and injuriously conveying a child sick of the smallpox through the public street,' thus exposing passengers to take the infection. That was, however, a very different case from the one now under consideration. Every public nuisance is indictable: 4 Blackstone's Commentaries, 106. But I apprehend that it will not be pretended that an indictment would have lain in this case against the children, or their father, or the proprietor of the hotel in which they were sick. Such a doctrine would punish as criminals the unfortunate victims of disease, and would be abhorrent to every principle of justice and humanity.

"We do not mean, however, to deny the largest powers, and the most liberal discretion, to boards of health, duly and legally constituted, to preserve the public health and prevent the spreading of a contagious disease by the severest quarantine and hospital regulations. But that question does not arise here." See, also, *Fisher v.*

Clarke, 41 Barb. 329, where the same principles were announced in a suit respecting the possession of diseased sheep. But the keeping of an infected person in a public place was held to constitute a public nuisance in *State v. De Wolfe*, 67 Neb. 321, 93 N. W. 746. In this general connection see, also, subd. XV, b, 5, and the following subdivision.

7. **Maintenance of Pesthouses in Settled Localities.**—In the well-considered case of *Managers of the Metropolitan Asylums District v. Hill*, 44 L. T., N. S., 653, Lord Blackburn said: "For though, as I have already said, I think it an incident to the use of a habitation in a town that the occupier must bear the necessary risks of the inmates of neighboring habitations falling ill of a contagious disease, I do not think it an accident that he is to submit to his neighbors willfully, though for very laudable motives and not maliciously, bringing in contagion where it did not previously exist, if the effect is not merely to alarm him but to injure him. This, I think, is borne out by the decisions on the subject of inoculation. Inoculation was, it is well known, introduced in this country in the early part of the eighteenth century. It consisted in artificially communicating the smallpox in such a manner that the patient took it in a very mild form, but was as much a source of infection to others as if the disease had been taken in the natural manner. The introduction of the practice was vehemently opposed. In 1752, a case came before Lord Hardwicke, which is reported in two reports: *Barnes v. Baker*, 1 Amb. 158; *Anonymous*, 3 Atk. 750. I collect from the two reports that it was proposed by private persons to erect a building in Coldbath Fields to be used as an hospital for the reception of persons ill of the smallpox, and also for the reception of persons who were there to be inoculated. The plaintiff was, it appears, owner of building land in the neighborhood, and gave evidence (of what seems very probable) that the fears of infection from the proposed hospital greatly deteriorated the letting value of his property. Lord Hardwicke refused to grant an injunction, saying, what is undoubtedly law, that loss arising from the fears of mankind, though reasonable, would not create a nuisance at law, and that before he could grant an injunction, he must be satisfied that what was proposed to be done would be a legal nuisance affecting the plaintiff's private rights. He is reported in *Ambler* to have said that he thought such a charity was likely to prove of great advantage to mankind. Such an hospital must not be far from a town, because those that are attacked with that disorder in 'a natural way may not be in a condition to be carried far.' This, I think, very true, and it is to be borne in mind when construing the act now in question, Lord Hardwicke seems to have decided that the plaintiff made out no nuisance to his private rights, and that even if the maintenance of a place for the artificial propagation of smallpox was

indictable, which seems not to have been Lord Hardwicke's opinion, that was a public and not a private nuisance. In *Rex v. Sutton*, 4 Burr. 2116, in 1767, it was held that an indictment for maintaining a house for inoculating for the smallpox was not so plainly bad as to be quashed on motion. This is all that appears from the report, but from what Lord Ellenborough says in *Rex v. Vautaudillo*, 4 Maule & S. 73, it would appear that there had been much more discussion at the time. In *Rex v. Burnett*, 4 Maule & S. 272, in 1815, it was decided that though inoculation for the smallpox may be practiced lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease. And I think, by necessary inference, it follows that to gather together in one spot patients suffering from infectious disease is lawful, but it must be under such guards as not to endanger the public health by communicating this infectious disease, and as it seems to me, as not to produce injury to the rights of the owners of adjoining property by producing a nuisance to it."

And to the same effect that pesthouses are public nuisances when located in well-settled communities, see *Haag v. Vanderburgh County*, 60 Md. 511, 58 Am. Rep. 654; *City of Baltimore v. Fairfield Improvement Co.*, 87 Md. 352, 67 Am. St. Rep. 344, 39 Atl. 1081, 40 L. R. A. 494.

d. Places or Manufacturing Plants Producing Noxious Odors or Fumes.

1. **Noxious Trades or Occupations in General.**—The carrying on of a noxious or offensive trade or occupation in a place remote from other buildings and public roads does not authorize its continuance at the same place after houses have been built in its immediate vicinity and public roads have been laid out in the neighborhood: *Ashbrook v. Commonwealth*, 1 Bush, 139, 89 Am. Dec. 616; *Commonwealth v. Upton*, 6 Gray, 473; *Board of Health v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444; *Taylor v. People*, 6 Park. Cr. Rep. 347; *Douglass v. State*, 4 Wis. 387.

2. **Public and Private Stables.**—Neither livery nor private stables are nuisances per se, though, of course, they may become such by the manner in which they are kept: *St. James Church v. Arrington*, 36 Ala. 546, 76 Am. Dec. 332; *Phillips v. City of Denver*, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902; *Coker v. Birge*, 9 Ga. 425, 54 Am. Dec. 347; *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505; *Keiser v. Lovett*, 85 Ind. 240, 44 Am. Rep. 10; *Shiras v. Olinger*, 50 Iowa, 571, 32 Am. Rep. 138; *King v. Hamil*, 97 Md. 103, 54 Atl. 625; *City of St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *City of Whitney v. Union Ry. Co.*, 11 Gray, 359, 71 Am. Dec. 715; *Dargan v. Waddil*, 9 Ired. 244, 49 Am. Dec. 421; *Kirkman v. Handy*, 11 Humph. 406, 54 Am. Dec. 45; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665.

3. **Smelting Works and Brick Kilns.**—Injury to a single person from lead poisoning because of a peculiar and exceptional susceptibility to such influence, when the trace of arsenic or lead is so slight as not to affect other persons in any degree, is not sufficient to make the lead works a common or public nuisance: *Price v. Grantz*, 118 Pa. St. 402, 4 Am. St. Rep. 601, 11 Atl. 794. In Appeal of Pennsylvania Lead Co., 96 Pa. St. 116, 42 Am. Rep. 534, the suit was for an injunction against a lead smelting works. The court, in holding the works to be a nuisance, adverted to the imprudence of undertaking the business of lead smelting in the midst of a rich suburban valley occupied by farms and country residences.

So, also, the business of brick burning is not necessarily a nuisance: *State v. St. Louis Board of Health*, 16 Mo. App. 8; *Hackenstine's Appeal*, 70 Pa. St. 102, 10 Am. Rep. 669. Most of the cases in which smelting works and brick kilns are questioned as being nuisances are suits for injunctions on the ground of such works constituting a private nuisance.

4. **Hogpens, Tanneries, Slaughter-houses, Rendering Plants and the Like.**—A piggery in which swine are kept in such numbers that their natural odors fill the air to such an extent that the occupation of the neighboring houses and passage over the adjacent highways is rendered disagreeable or worse is a public nuisance: *Commonwealth v. Perry*, 139 Mass. 198, 29 N. E. 656, citing *Commonwealth v. Kidder*, 107 Mass. 188; *Regina v. Wigg*, 2 Salk. 460, 2 Ld. Raym. 1163. But the stench from hogpens must be such as to be offensive to a person of ordinary sensibilities, and the mere fact that the place is kept as cleanly as possible under the circumstances is no defense if the effect is sufficient to constitute a public nuisance: *City of Burlington v. Stockwell*, 5 Kan. App. 569, 47 Pac. 988. But the mere noise and squealing made by hogs kept in a slaughter-house yard over night to cool before being slaughtered is not sufficient to constitute the place a nuisance: *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321.

A person cannot be found guilty of maintaining a hogpen which is a common nuisance where the smell created by his pen alone would not constitute a nuisance and the offensive condition is caused by the contribution of smells from the various pens of like character in the locality: *Gay v. State*, 90 Tenn. 645, 25 Am. St. Rep. 707, 18 S. W. 260. But in this connection see, to the contrary effect, *Dennis v. State*, 91 Ind. 291; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419. Under some circumstances a tannery is regarded as a public nuisance: *Francis v. Schollkopf*, 53 N. Y. 152.

For a slaughter-house to become a public nuisance it is not necessary that the odors emitting from it should be dangerous to public health, since it is sufficient if they are seriously offensive to the senses of those passing by the place: *State v. Woodbury*, 67 Vt. 602,

32 Atl. 495. Slaughter-houses located in the midst of populous districts have been generally regarded as public nuisances on account of the offensive odors commonly generated, though such places under improved processes may doubtless be conducted in many localities now in which, years ago, they could not have been conducted without becoming public nuisances. In this general connection, see *Dennis v. State*, 91 Ind. 291; *Reichert v. Geers*, 98 Ind. 73, 49 Am. Rep. 736; *Rhoades v. Cook*, 122 Iowa, 336, 98 N. W. 122; *Seifried v. Hays*, 81 Ky. 377, 50 Am. Rep. 167; *Beckham v. Brown* (Ky.), 40 S. W. 684; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Dubois v. Budlong*, 15 Abb. Pr. 445; *People v. Rosenberg*, 138 N. Y. 410, 34 N. E. 285; *Phillips v. State*, 7 Baxt. 151; *Wilcox v. Henry*, 35 Wash. 591, 77 Pac. 1055. And compare *Pruner v. Pendleton*, 75 Va. 516, 40 Am. Rep. 738; *Minke v. Hofeman*, 87 Ill. 450, 29 Am. Rep. 63. The same general rules obtain with respect to rendering establishments: *Seacord v. People*, 121 Ill. 683, 18 N. E. 194; *Tiede v. Schneid*, 105 Wis. 470, 81 N. W. 826; and fat boiling establishments: *Westheimer v. Schultz*, 33 How. Pr. 11; cattle yards, for the fattening of cattle within corporate limits, are of course quite likely to become public nuisances: *Board of Aldermen v. Norman*, 51 La. Ann. 736, 25 South. 401; and the same general rule prevails with respect to soap or tallow factories: *Winslow v. City of Bloomington*, 24 Ill. App. 647; *Allen v. State*, 34 Tex. 230.

5. **Garbage and Fertilizer Manufacturing Plants.**—It has been held that a garbage furnace, erected under the provisions of an ordinance, in a most unobjectionable place and constructed on most scientific principles, is not a public nuisance, even though it may be an annoyance to some persons: *Fisher v. American Reduction Co.*, 189 Pa. St. 419, 42 Atl. 36. And a guano manufactory, though it may make an extensive use of undeodorized decayed fish, is not a nuisance per se: *Duffy v. Meadows*, 131 N. C. 31, 42 S. E. 460; but see *State v. Luce*, 9 Houst. 396, 32 Atl. 1076, to the contrary effect where the plant is in a populous neighborhood. And see, also, the principal case (*Acme Fertilizer Co. v. State*, 34 Ind. App. 346, ante, p. 190, 72 N. E. 1037), where a plant for the manufacture of mercantile products from the bodies of dead animals was held a public nuisance.

6. **Emission of Dense Smoke.**—The emission of dense smoke is regarded as a matter in the nature of a public nuisance, but is generally regulated by municipal ordinances: See *Boss v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *City of St. Paul v. Haugbro*, 93 Minn. 59, 106 Am. St. Rep. 427, 100 N. W. 470, 66 L. R. A. 441, and cross-reference note; *St. Louis v. Heitzberg etc. Co.*, 141 Mo. 375, 64 Am. St. Rep. 516, 42 S. W. 954, 39 L. R. A. 551; *State v. Tower*, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402.

e. Matters or Things Constituting a Menace to Life or Limb.**1. In General.**

A. Keeping of Dangerous Animals.—In *Speckmann v. Kreig*, 79 Mo. App. 376, the keeping of a vicious dog apparently was regarded as a nuisance, though the gist of the action, which was one for personal injuries, seems to have been based on the negligent manner in which the ferocious dog was kept.

B. Maintenance of Dangerous Eaves-troughs.—The maintenance of a weak, warped, and rotten eaves-trough, twenty feet above the sidewalk and projecting over it was held to be a nuisance: *Keeler v. Lederer Realty Corporation*, 26 R. I. 524, 59 Atl. 855. See, also, the dicta in *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159.

C. Setting of Spring-guns.—The mere act of setting spring-guns on one's premises for their protection is not unlawful in itself, but the person so doing may be responsible for injuries caused thereby to individuals, and may be indictable for the erection of a nuisance if the public are thereby subjected to any danger: *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159.

2. Dangers Arising from Explosive Materials or Gases.

A. Manufacture or Storage of Explosive Materials.—The earlier authorities were more strict with respect to the erection of powder magazines near populous parts of a city and considered such erections public nuisances per se: *Cheatham v. Shearn*, 1 Swan, 213, 55 Am. Dec. 734. Although some of the courts state that the storing of light explosives on one's premises is not a public nuisance per se, still if located where dwellings are immediately contiguous and persons are constantly passing, it seems that such storing of the explosives will be regarded as a nuisance: *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Kleebauer v. Western Fuse etc. Co.*, 138 Cal. 497, 94 Am. St. Rep. 62, 71 Pac. 617, 60 L. R. A. 377. Thus the keeping of a large quantity of gunpowder in a wooden building near other buildings has been said to constitute a public nuisance: *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Bradley v. People*, 56 Barb. 72; *Chicago etc. Coal Co. v. Glass*, 34 Ill. App. 364. But it was held that the keeping of fifty pounds of common powder in a place near a dwelling-house and near a public street does not, irrespective of the manner of its keeping, constitute a public nuisance: *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296. Though the keeping in a populous part of the city of upward of one hundred pounds of dynamite was held to constitute a nuisance at common law: *Ricker v. McDonald*, 89 App. Div. 300, 85 N. Y. Supp. 825.

In *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 593, 37 L. R. A. 497, the court after an exhaustive review of the English and American cases on the subject, came to the conclusion that on account of the better means now employed to protect powder

magazines and such the like from explosions, that the storing and keeping of gunpowder and dynamite in large quantities near dwellings in a thickly settled portion of a city and near a public street, is not a nuisance per se, and that in order to constitute such a keeping a nuisance, public or private, there must be other circumstances arising from the manner in which it is kept. But in another well-considered case, it was held that the manufacture and keeping of large quantities of gunpowder and other explosives in, or dangerously near to, public places, such as towns and highways, is a public nuisance, whether negligently or carefully kept or not: *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035; *Huntington etc. Co. v. Phoenix Powder Mfg. Co.*, 40 W. Va. 711, 21 S. E. 1037. See, generally on this subject, monographic note to *Kinney v. Koopman*, 67 Am. St. Rep. 134; *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146, 40 Pac. 1020, 29 L. R. A. 718; *Lafin etc. Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34, 23 N. E. 889, 7 L. R. A. 262; *Cameron v. Kenyon-Connell Com. Co.*, 22 Mont. 312, 74 Am. St. Rep. 602, 56 Pac. 358, 44 L. R. A. 508; *Appeal of Wier*, 74 Pa. St. 230; *Appeal of Dilworth*, 91 Pa. St. 247; *Emory v. Hazard Powder Co.*, 22 S. C. 476, 53 Am. Rep. 730; *Ft. Worth etc. Ry. Co. v. Beauchamp*, 95 Tex. 496, 93 Am. St. Rep. 864, 68 S. W. 502, 58 L. R. A. 716.

B. Blasting Operations or Exhibiting of Fireworks.—Blasting operations carried on continuously for more than a year on premises platted for city purposes have been held to constitute prima facie a nuisance, irrespective of the degree of care exercised, though it does not appear that the court regarded it as a public nuisance: *Longtin v. Persell*, 30 Mont. 306, 104 Am. St. Rep. 723, 76 Pac. 699, 65 L. R. A. 655. See authorities cited in this case and cross-reference note attached thereto.

A fireworks exhibition on an extensive scale, in a great thoroughfare, in the midst of a large city where a vast multitude of people is assembled, if not a nuisance as a matter of law, may properly be found such as a matter of fact: *Landau v. New York*, 180 N. Y. 48, 105 Am. St. Rep. 709, 72 N. E. 631. And see, also, cases cited in cross-reference note to the case just cited. So, also, it has been held that the discharge of fireworks at the junction of two narrow streets of a large city, where any misadventure would likely result in injury to persons or property, constitutes a public nuisance where the display is of considerable magnitude and the explosives are heavily charged, and the discharge is managed by private persons not under any official responsibility: *Spier v. City of Brooklyn*, 139 N. Y. 6, 36 Am. St. Rep. 664, 34 N. E. 727, 21 L. R. A. 641. In this connection see, also, *Crowley v. Rochester Fireworks Co.*, 95 App. Div. 13, 88 N. Y. Supp. 483.

C. Allowing Cars Loaded with Explosives to Stand on Tracks Unreasonable Time.—If a railway car loaded with giant or blasting powder is unnecessarily and unreasonably delayed at a place so as to subject property to danger for a longer time than would have attended a transportation made with reasonable dispatch, such keeping of the car at that place is a nuisance: *Forth Worth etc. Ry. Co. v. Beauchamp*, 95 Tex. 496, 93 Am. St. Rep. 864, 68 S. W. 502, 58 L. R. A. 716.

D. Oil Refineries, Gas Wells or Leaks.—In *Commonwealth v. Miller*, 139 Pa. St. 77, 23 Am. St. Rep. 170, 21 Atl. 138, it was said: "People who live in great cities that are sustained by manufacturing enterprises must necessarily be subject to many annoyances and positive discomforts, by reason of noise, dust, smoke and odors, more or less disagreeable, produced by, and resulting from, the business that supports the city. They can only be relieved from them by going into the open country. The defendants had a right to have the character of their business determined in the light of all the surrounding circumstances, including the character of Alleghany as a manufacturing city, and the manner of the use of the river front for manufacturing purposes. If, looked at in this way, it is a common nuisance, it should be removed; if not, it may be conducted without subjecting the proprietors to the pecuniary loss which its removal would involve." It was unsuccessfully sought to declare an oil refinery to be a public nuisance.

One who sinks a gas well in a thickly populated part of a city is guilty of maintaining a public nuisance if he collects dangerous explosives, such as large quantities of nitroglycerin or other nitro-explosive compounds with which to "shoot" the well, since it will endanger the lives and property of persons in the vicinity: *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 Am. St. Rep. 433, 31 N. E. 59, 16 L. R. A. 443. And in another Indiana case, the waste of natural gas was declared to be a public nuisance: *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627. But the mere sinking of a gas well to supply fuel for a manufacturing plant is not a nuisance per se: *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 62 Am. St. Rep. 532, 47 N. E. 2, 37 L. R. A. 381. For a case involving the explosion of gas in a subway caused by a leakage, see *Koplan v. Boston Gas-light Co.*, 177 Mass. 15, 58 N. E. 183.

f. Obstructions or Encroachments of a Permanent Character on Streets or Highways.

1. In General.—Any unauthorized obstruction to a street which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law: Monographic note to *Callanan v. Gilman*, 1 Am. St. Rep. 840. See, also, to the same effect, *Kelly v. Pittsburgh etc. Ry.*, 28 Ind. App. 457, 91 Am. St. Rep. 134, 63 N.

E. 233; *Nelson v. Fehd*, 104 Ill. App. 114; *State v. Mayor etc. of Mobile*, 5 Port. 279, 30 Am. Dec. 564; *Commonwealth v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Everett v. City of Marquette*, 53 Mich. 450, 19 N. W. 140; *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114; *Hart v. Mayor of Albany*, 9 Wend. 571, 24 Am. Dec. 165; *State v. Harden*, 11 S. C. 360; *State v. Smith*, 54 Vt. 403; *West Seattle v. West Seattle Land & Imp. Co.*, 38 Wash. 359, 80 Pac. 549. Likewise the obstruction of a public alley is regarded as a public nuisance: *Harniss v. Bulpitt* (Cal. App.), 81 Pac. 1022. But see *Bagley v. People*, 43 Mich. 355, 38 Am. Rep. 192, 5 N. W. 415. In some states obstructions to streets are expressly declared to be public nuisances by statutory enactment: See *Tinker v. New York etc. Ry. Co.*, 157 N. Y. 312, 51 N. E. 1031. And in some states encroachments on the public streets are regarded as public nuisances: See *Baldwin v. Trimble*, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489; *City of Valparaiso v. Bogarth*, 153 Ind. 536, 55 N. E. 439, 47 L. R. A. 487. But in this connection see subdivision III. Trees on streets, however, are not regarded as nuisances per se: *Birget v. Greenfield*, 120 Iowa, 432, 94 N. W. 933; *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 106 Am. St. Rep. 549, 73 N. E. 1108.

Of course, a temporary obstruction of a street or highway for a reasonable length of time for some necessary purpose is not regarded as a public nuisance: See monographic note to *Callanan v. Gilman*, 1 Am. St. Rep. 840. It is sometimes difficult to ascertain what constitutes such a permanent obstruction as to be regarded as a public nuisance. Thus, in *Bates v. Holbrook*, 171 N. Y. 460, 64 N. E. 181, the erection of buildings and structures for the storage of tools, machinery, and an air-compressing plant, to be used in the construction of the New York subway, a work which was to continue for three years or more, was regarded as a permanent obstruction. So, also, encroachment of twenty-two inches on the sidewalk of pillars of a building was regarded as a public nuisance: *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144, 59 L. R. A. 399. And a wall of masonry and an iron structure along the middle of a highway to connect a surface railway with an elevated railroad is a public nuisance where constructed without competent authority: *Eldert v. Long Island etc. Ry.*, 28 App. Div. 451, 51 N. Y. Supp. 186.

2. **Bridges, Viaducts, and Approaches Thereto.**—A bridge across a street for private use is a public nuisance, though it is so high above the surface as not to impede the passage of ordinary vehicles: *Bybee v. State*, 94 Ind. 443, 48 Am. Rep. 175; *Knox v. City of New York*, 55 Barb. 404. Consequently a structure connecting two buildings on opposite sides of a street was held to be a public nuisance, notwithstanding the fact that it is so high above the street as not to interfere with street traffic: *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629, 52 L. R. A. 409. But it has been held that an

approach to a bridge which crosses a public street in such a manner as not to interfere with public travel is not a nuisance: *Commonwealth v. Pittson Ferry Bridge Co.*, 148 Pa. St. 621, 24 Atl. 87.

3. **Allowing Bridges or Approaches Thereto to Become Out of Repair.**—Allowing a highway bridge over a millrace to become out of repair is regarded as a public nuisance: *Town of Clay v. Hart*, 25 Misc. Rep. 110, 55 N. Y. Supp. 43. Likewise the failure of a railroad company to keep in repair the approaches to a highway crossing: *Commonwealth v. Louisville etc. R. Co.*, 109 Ky. 59, 58 S. W. 478.

4. **Barbed-wire and Other Fences.**—The erection of a fence across a public road is a public nuisance: *State v. Hunter*, 5 Ired. 369, 44 Am. Dec. 41. But an ordinance prohibiting the erection of a barbed-wire fence "on a street or alley" does not render the erection of such a fence on parts of a lot not facing a street or alley a nuisance per se: *Presnall v. Raley* (Tex. Civ.), 27 S. W. 200.

5. **Unauthorized Railway Tracks, Depots, Roundhouses, Turntables, Tollhouses, Telephone or Other Wires or Changes in Motive Power of Street Railways.**—Railway tracks on the public street without authority of law are such obstructions as amount to public nuisances: *Denver etc. Ry. Co. v. Denver City Ry. Co.*, 2 Colo. 673. See, also, *Poole v. Falls Road etc. Ry. Co.*, 88 Md. 533, 41 Atl. 1069; *Randle v. Pacific R. R. Co.*, 65 Mo. 325; *People v. Northern Cent. Ry. Co.*, 164 N. Y. 289, 58 N. E. 138; *Town of Mason v. Ohio River R. Co.*, 51 W. Va. 183, 41 S. E. 418; *Pittsburgh etc. Ry. Co. v. Wood*, 94 Fed. 618, 36 C. C. A. 423; *Miller v. Long Island R. Co.*, Fed. Cas. No. 9580a, to the same general effect. A depot in a public street has been regarded as a public nuisance: *Douglass v. Leavenworth*, 6 Kan. App. 96, 49 Pac. 676. Likewise have a roundhouse and turntable: *Platt v. Chicago etc. Co.*, 74 Iowa, 127, 37 N. W. 107. And where the franchise merely authorizes the construction of railway tracks in the center of the street, the construction on one side of the center is regarded as a public nuisance: *Reynolds v. Presidio etc. R. Co.* (Cal. App.), 81 Pac. 1118. Of course where a telephone company erects its line in a street with the consent of both the state and the city, the line is not a nuisance: *Brown v. South Western Tel. etc. Co.*, 17 Tex. Civ. App. 433, 44 S. W. 59. Maintenance of electric lighting appliances on a street after the expiration of the license therefor is a public nuisance: *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495. Likewise is a toll-house after the abandonment of the turnpike: *Lancaster Turnpike Co. v. Rogers*, 2 Pa. St. 114, 44 Am. Dec. 179. But where a corporation chartered to operate street-cars by animal power, merely changes to an underground cable, such change is not regarded as constituting the railway a public nuisance: *Chicago General*

Ry. Co. v. Chicago City Ry., 87 Ill. App. 17; affirmed in 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734.

6. **Flag Staffs.**—A flag staff on a public street was regarded as a public nuisance: *Dreker v. Yates*, 43 N. J. L. 473. But see *Alleghany v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649.

7. **Maintaining Outward Swinging Doors.**—The maintenance of large and heavy barn doors swinging outward over the sidewalk has been held to constitute a nuisance: *Holroyd v. Sheridan*, 53 App. Div. 14, 65 N. Y. Supp. 442.

8. **Booths and Fruit Stands.**—The permanent maintenance of a fruit stand on a sidewalk in a thickly populated city has been held to constitute a public nuisance: *Costello v. State*, 108 Ala. 45, 18 South. 820, 35 L. R. A. 303; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117. But the maintenance of a market cart for the sale of vegetables was held not to constitute such a nuisance: *State v. Edens*, 85 N. C. 522.

9. **Wooden Awnings, Overhanging Roofs or Bay Windows.**—The maintenance of wooden awnings of the character in general use and the use of which is recognized by city ordinances has been held not to constitute public nuisances: *Hawkins v. Sanders*, 45 Mich. 491, 8 N. W. 98; *Hoey v. Gilroy*, 129 N. Y. 132, 29 N. E. 85. A building so constructed that its roof overhangs the street has been regarded as a nuisance: *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164. Likewise has a bay window which projected three feet and a half beyond the building line: *Remiers' Appeal*, 100 Pa. St. 182, 45 Am. Rep. 373.

10. **Loading Platforms.**—In *Murphy v. Leggett*, 164 N. Y. 121, 58 N. E. 42, a long platform alongside of a wholesale grocery store was held not to constitute a nuisance, and in *Parmenter v. Marion*, 113 Iowa, 297, 85 N. W. 90, a loading platform projecting from the second story of a business house was regarded as no nuisance, while in *Bagley v. People*, 43 Mich. 355, 38 Am. Rep. 192, 5 N. W. 415, a loading platform in an alley at the rear of a store was held not a nuisance per se.

11. **Abstracting Earth from Highway.**—Taking away earth from a highway and thereby lowering the level below the established grade, but improving the street, was held not to constitute a public nuisance, even though it may have amounted to a trespass: *State v. Peckard*, 5 Harr. (Del.) 500.

g. Temporary Obstructions to Streets and Highways.

1. **In General.**—Any temporary obstruction in a public street is presumptively a public nuisance, and it is incumbent upon the person responsible for the presence of such obstruction to show that it was placed in the street in furtherance of a lawful and legitimate purpose, and has not been continued for a longer time than was reason-

ably necessary: *City of Augusta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147, 50 S. E. 998, 69 L. R. A. 564.

2. **Passing or Casting of Handbills or Circulars.**—The case of *City of Philadelphia v. Brabender*, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220, discussed the reasonableness of an ordinance prohibiting the casting of advertising circulars, handbills and waste paper into the vestibules of dwellings, and intimated that such acts were not public nuisances per se, even though it was contended that the wind catching such papers would cast them in the streets, to the annoyance and inconvenience of the general public. In this connection see, also, *People v. Armstrong*, 73 Mich. 288, 16 Am. St. Rep. 578, 41 N. W. 275, 2 L. R. A. 721.

3. **"Coasting" on Public Streets.**—Coasting with sleds on streets to the danger of pedestrians or others seems to be regarded as a public nuisance: *Taylor v. Mayor etc. of Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027. In this connection see, also, the monographic note to *Dudley v. City of Flemingsburg*, 103 Am. St. Rep. 290.

4. **Running Trains Across Highways at High Rate of Speed.**—The running of trains across highways at a speed of from fifteen to twenty miles an hour without warning is a public nuisance: *Louisville etc. R. Co. v. Commonwealth*, 80 Ky. 143, 44 Am. Rep. 468.

5. **Blocking of Streets or Crossings by Trains.**—A railroad company which willfully and continuously allows its freight trains to stand for a long and unreasonable length of time across a public street was said to be guilty of a public nuisance in *Illinois Central R. Co. v. Commonwealth (Ky.)*, 45 S. W. 367.

6. **Causing the Blocking of a Street with Teams.**—Blocking a public siding with teams for the purpose of obstructing traffic, in order to compel a common carrier to receive coal at another siding, was held to constitute a public nuisance: *Robinson v. Baltimore etc. R. Co.*, 129 Fed. 753. And distillers delivering slops in a street through pipes extending across the sidewalk into carts of customers standing in the streets, where, by reason of the throng of teams, disorder and strife among the drivers in endeavoring to obtain priority over each other, public travel is constantly impeded, may be indicted for maintaining a public nuisance: *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709.

7. **Processions and Parades.**—The ordinary obstruction of a street caused by a lawful procession or parade is not a public nuisance. These matters, however, are generally regulated by appropriate ordinances: *People v. Rochester*, 44 Hun, 166; *State v. Hughes*, 72 N. O. 25.

8. **Use of Steam Engines on Streets.**—A steam engine, as a means of locomotion on a highway, is not necessarily a nuisance: *Macomber*

v. Nichols, 34 Mich. 212, 22 Am. Rep. 522. In this connection see, also, Smith v. Stokes, 4 B. & S. 84, 32 L. J. M. C. 199, 8 L. T. 425, 11 Week. Rep. 753; Watkins v. Reddin, 2 Fost. & F. 629.

9. **Mortar Beds, Lumber Piles or Other Temporary Structures While Constructing Buildings.**—Temporary obstructions to a street with the consent of the proper authorities, while constructing a building, sidewalk, or other work, are not public nuisances: *Malkan v. Carlin*, 93 N. Y. Supp. 378. Consequently, it was held to constitute no nuisance to make mortar beds in the streets: *Strauss v. Louisville*, 108 Ky. 155, 55 S. W. 1075. Nor is it a nuisance to unload, or temporarily pile, lumber in a street: *Johnson Chair Co. v. Agresto*, 73 Ill. App. 384.

10. **Holding of Street Fairs.**—The use of a large portion of a business street by private individuals for their own pecuniary benefit for the purposes of a street fair, consisting of numerous tents, including shows and exhibitions, together with various stands, booths, and structures for the amusement of the public and the private gain of the owners, and by which the public is deprived for several days of the right to use that portion of the street for traffic or travel, is a public nuisance: *City of Augusta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147, 50 S. E. 998, 69 L. R. A. 564.

11. **Making of Speeches in the Street.**—In an early case in Pennsylvania it was held to be a public nuisance to collect in the streets of a city large numbers of people, by means of loud and indecent language addressed to passers-by, so as to obstruct the public right of passage along the street: *Barker v. Commonwealth*, 19 Pa. St. 412. But in *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664, the court held that the making of a speech in the street is not, ipso facto, a public nuisance. And commenting on the case cited above, the court said: "The indictment against Barker was for obstructing the streets of Pittsburg, through crowds collected by means of violent, loud, and indecent language addressed to those passing by; and by this means collecting assemblages of men, boys, and idle, dissolute and disorderly persons. A street may not be used, in strictness of law, for public speaking; even preaching or public worship, on a pavement before another's house may not be prosecuted to annoy him, but it does not follow that everyone who speaks or preaches in the street, or who happens to collect a crowd therein by other means, is therefore guilty of the indictable offense of nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance per se. Such a stringent interpretation of the case of Barker is scarcely suited to the genius of our people or to the character of their institutions, and would lead to the repression of many usages of the people now tolerated as harmless, if not necessary. Those who draw crowds together in the

street by window displays, music, parades and the like, might be made answerable for many misfortunes if the doctrine of nuisance be so extensive in its consequences."

12. **Piling of Logs Dangerously Near Street.**—The piling of logs so near a highway that if one of them rolled off it must cross the traveled path, is said to constitute a public nuisance: *Lawton v. Olmstead*, 40 App. Div. 544, 58 N. Y. Supp. 36.

13. **Excavations or Openings in or Near Streets.**—A dangerous opening in a much frequented street may become a public nuisance: *Beatty v. Gilmore*, 16 Pa. St. 463, 55 Am. Dec. 514. And it is said that an excavation so near a public way that persons lawfully, and with ordinary care, using the way may fall into it is a nuisance unless proper means are adopted to guard against the occurrence of such accidents: *State v. Society etc. Useful Manufactures*, 42 N. J. L. 504.

14. **Things Near Street or Highway Which Frighten Teams.**—The leaving of a handcar so near a public road that the buckets and clothing hung on it will frighten passing teams was declared a public nuisance in *Cincinnati R. Co. v. Commonwealth*, 80 Ky. 137. But a railway pumping station so near a highway that its smoke sometimes frightens, was declared insufficient to constitute a public nuisance in *Pettit v. New York etc. R. Co.*, 80 Hun, 86, 29 N. Y. Supp. 1137.

h. **Obstructions to Navigation.**—The subject of obstructions to navigation having been exhaustively treated in the monographic note to *South Carolina Steam Boat Co. v. Wilmington etc. R. Co.*, 57 Am. St. Rep. 693, we will not advert to that phase of the subject further than to observe that navigable waters being regarded in the same light as public highways, the same general rules apply. We will, however, append a few cases touching various alleged obstructions to navigation, viz.: Placing of fish traps in navigable streams: *Stump v. McNairy*, 5 Humph. 363, 42 Am. Dec. 437. Floating warehouses or elevators: *Hart v. Mayor of Albany*, 9 Wend. 571, 24 Am. Dec. 165; *People v. Horton*, 64 N. Y. 610. Bridges: *South Carolina R. Co. v. Moore*, 28 Ga. 398, 73 Am. Dec. 778; *Charleston & S. Ry. v. Johnson*, 73 Ga. 306; *State v. Morris Canal etc. Co.*, 22 N. J. L. 537; *Healy v. Joliet etc. R. Co.*, 2 Ill. App. 435; *People v. Kelly*, 76 N. Y. 475; *People v. Jessup*, 28 App. Div. 524, 51 N. Y. Supp. 228; *Selman v. Wolfe*, 27 Tex. 68; *Texarkana etc. Co. v. Parsons*, 74 Fed. 408. Drawbridges: *Williams v. Beardsley*, 2 Ind. 591; *State v. Freeport*, 43 Me. 198; *Attorney-General v. Paterson etc. R. Co.*, 9 N. J. Eq. 526; *Works v. Junction R. Co.*, 5 McLean, 425, Fed. Cas. No. 18,046. Dams: *Moffett v. Brewer*, 1 G. Greene (Iowa), 348; *State v. Close*, 35 Iowa, 570; *Simpson v. Seavey*, 8 Me. 138, 22 Am. Dec. 228; *Rogers v. Barker*, 31 Barb. 447; *People v. Page*, 39 App. Div. 110, 56 N. Y. Supp. 834, 58 N. Y. Supp. 239; *Commonwealth v. Church*, 1 Pa. St. 105, 44

Am. Dec. 112; *Newbold v. Mead*, 57 Pa. St. 487. Booms: *Pascagoula Boom Co. v. Dickson*, 77 Miss. 587, 78 Am. St. Rep. 537, 28 South. 724; *Union Mill Co. v. Shores*, 66 Wis. 476, 29 N. W. 243. Cries or piers: *People v. Vanderbilt*, 28 N. Y. 396, 84 Am. Dec. 351; *Dutton v. Strong*, 1 Black, 23. Wharves: *Keyport etc. Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 511; *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701; *Respublica v. Caldwell*, 1 Dall. 150. Mining debris and other refuse: *Yuba County v. Kate Hayes Min. Co.*, 141 Cal. 360, 74 Pac. 1049; *Peck v. Michigan City*, 149 Ind. 670, 49 N. E. 800.

1. **Buildings or Structures on Public Grounds Other Than Streets or Highways.**—A building or like structure, erected on a public square or common, without lawful authority, is regarded as a public nuisance: *State v. Atkinson*, 24 Vt. 448; *Bung v. Shoneberger*, 3 Watts, 23, 26 Am. Dec. 95; *Commonwealth v. Rush*, 14 Pa. St. 186. Likewise a fence erected upon a common landing place is regarded in Massachusetts as a public nuisance: *Commonwealth v. Tucker*, 3 Pick. 44.

LEONARD v. WHETSTONE.

[34 Ind. App. 383, 68 N. E. 197.]

MARRIAGE CONTRACTS—Breach of Under Advice of Parent.—A parent has a right to advise his child whether he or she shall enter into a marriage contract, and also to advise the breach of such contract already entered into, when in the judgment of the parent the marriage ought not to take place, and such advice or the result thereof, is not actionable. (p. 254.)

MARRIAGE CONTRACTS—Breach of Because of Slanderous Charges.—If a person is induced to refuse to comply with his agreement to marry by false and slanderous charges made against the other party by a third person, an action will lie against such third person for libel or slander, but not for causing a breach of the contract to marry. (p. 255.)

MARRIAGE CONTRACTS—Breach of Under Parent's Advice.—A parent's advice inducing their son to refuse to perform his contract to marry another is not an actionable wrong. (p. 255.)

G. Shirts, W. R. Fertig, J. E. Garver and D. Waugh, for the appellant.

S. D. Stuart, C. G. Reagan, J. M. Fippen and J. M. Purvis, for the appellees.

384 HENLEY, J. In this appeal error is properly assigned, presenting the questions arising out of the action of

the trial court in sustaining the demurrer of appellees to the two paragraphs of complaint filed by appellant.

Each paragraph of the complaint seeks to recover damages from appellees for injuries sustained by appellant by reason of the alleged wrongful acts of appellees in procuring their son to cancel and break a marriage contract existing between him and appellant, the said son having at the time seduced appellant and begotten her with child. The averments of the first paragraph of complaint are briefly as follows: That appellees are possessed of a large amount of property; that the families of appellant and appellees resided in the same neighborhood, and were intimately acquainted, and of equal social standing; that the son of appellees was a young man of intelligence and fine address, and was in every way fitted to be the husband of appellant; that said son, with the knowledge and consent of appellees, for three years was appellant's suitor, and was often at her home and with her in public; that he won her love, and they became engaged to be married, and that, under such promise to marry, said son seduced appellant and begot her with child; that appellees knew these facts before they committed the alleged wrongful acts. It is further alleged that appellant was in every way fit and competent to become the wife of said son, and that, being pregnant by him, she requested him to marry her at once, in order to protect her good name; that said son agreed so to do, and applied for a license to ^{and} marry her; that appellees learned of said facts, and conspired together to wrong the appellant and to prevent the marriage by maliciously persuading, commanding and hiring their said son not to marry appellant, and to violate his said marriage contract; that appellees falsely stated to the clerk of the circuit court that their said son was a minor, and commanded the clerk not to issue the marriage license, and, further, to cause said marriage contract to be broken, they told their said son that if he married appellant they would drive him from home, disown and disinherit him; that appellees hired another person to take said son to parts unknown, and paid said son large sums of money to remain away, so that appellant could not communicate with him; that by reason of said acts and words of appellees, the said son refused to marry appellant; that thereupon appellant sued the said son for breach of said marriage contract and for seduction, and recovered a judgment against him for five thousand dollars; that no execution has been issued on said

judgment, and that the same is unpaid and uncollectible; that the appellant, on account of said promise to marry, made preparations therefor, and denied herself the society and attentions of other young men; that but for the wrongful and malicious acts of appellees, their said son would have married appellant, and continued to love and respect her. The further allegation is made that at the time this action was commenced, appellant had become the mother of the child begotten as aforesaid, and that by the acts of appellees she had been damaged in the sum of ten thousand dollars.

Counsel for appellant in their brief say: "The second paragraph is like the first, except that it alleges as additional means used by appellees to prevent the marriage that they spoke to their son certain false and slanderous words of and concerning appellant, imputing to her the sin of whoredom and the crime of abortion." It will thus be seen ³²⁶ that both paragraphs of the complaint are drawn upon the theory that appellees are liable in damages to appellant by causing their son to refuse to carry out his promise to marry through and by reason of the acts in the complaint alleged to have been done and committed by them. It also clearly appears in each paragraph of the complaint that the action commenced by appellant against John W. Whetstone, the son of appellees, in which action she recovered judgment for five thousand dollars, was for the breach of the marriage contract, and that the seduction was alleged therein only for the purpose of aggravating the damages. In other words, it appears that appellant elected to prosecute her action against the son *ex contractu*. The proximate cause of the damages recovered by her, and represented by the judgment, was the breach of the marriage contract, and not the seduction. The rule applicable to joint trespassers, as stated in *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 7111, is, therefore, not in point here.

1. We cannot hold other than that a parent has a perfect right to advise the child whether he or she shall enter into a contract of such importance as one of marriage. Nor should parents' advice be withheld from a child where an agreement to marry has been made, and in the judgment of the parents of either of the contracting parties, the union ought not to take place.

Judge Cooley, in his work on Torts, second edition, page 277, says: "The prevention of a marriage by the interference

of a third person cannot, in general, in itself, be a legal wrong. Thus if one, by solicitations, or by the arts of ridicule or otherwise, shall induce one to break off an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct."

2. But if a person is induced to refuse to comply with his agreement to marry by false and slanderous charges made against the other party to the agreement by a third person, the action is not against the third person for causing ³⁸⁷ a breach of the contract, but for slander or libel, as the case might be.

3. Appellees' advice may have induced their son to refuse to perform his contract to marry appellant. This was not an actionable wrong upon the part of appellees. If the son was of legal age, he had a right to refuse to act upon the advice given. He was not advised to commit the crime of seduction, nor does the complaint so charge.

4. Neither paragraph of the complaint, under the acknowledged theory of the pleader, states a cause of action. The demurrer was properly sustained to both paragraphs.

Judgment affirmed.

A Father Who Believes Disparaging Reports about a suitor of his daughter, and who repeats them to friends of the suitor in confidence, without intending to injure him, but to convey to him that his attentions to the daughter must cease, is not guilty of slander: *Bayaset v. Hire*, 49 La. Ann. 904, 62 Am. St. Rep. 675. See, too, *McBride v. Ledoux*, 111 La. 398, 100 Am. St. Rep. 491; *Bryan v. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726; *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717; note to *Shurtleff v. Stevens*, 31 Am. Rep. 714.

Actions for Breach of Promise to Marry are discussed in the monographic note to *Burnham v. Cornwell*, 63 Am. Dec. 532-548; *Shackelford v. Hamilton*, 40 Am. St. Rep. 172-176. Seduction is the subject of a monographic note to *Bradshaw v. Jones*, 76 Am. St. Rep. 659-682.

STATE v. TABLER.

[34 Ind. App. 393, 72 N. E. 1039.]

NUISANCE—Sale of Intoxicating Liquor.—A license to sell intoxicating liquors does not protect the holder from the consequences of unlawful practices on the premises, and persons so offending may be liable, as for a nuisance, to a property owner individually damaged thereby. (p. 258.)

NUISANCE, PUBLIC.—A nuisance is a public nuisance if it annoys such part of the public as necessarily comes in contact with it. (p. 258.)

NUISANCE, PUBLIC—Blind Tiger.—A keeper of a "blind tiger" means a person engaged in the unlawful sale of intoxicating liquors, and whose place of business is a common nuisance. (p. 258.)

NUISANCE, PUBLIC—Blind Tiger.—A "blind tiger" is a public nuisance. (p. 259.)

NUISANCE, PUBLIC.—The maintenance of a public place equipped with devices intended to make the violation of the law comparatively safe from criminal prosecution and in which it is well known that the law is systematically violated is not only offensive to the senses and a nuisance, but also a menace to the peace of the community. (p. 259.)

J. H. Luckett, prosecuting attorney, G. W. Self, W. Ridley and R. S. Kirkham, for the state.

M. W. Funk, for the appellees.

³⁹⁴ **COMSTOCK, C. J.** Appellees were indicted for maintaining a public nuisance. A motion to quash was sustained by the trial court, and from that ruling appellant appeals.

The indictment charges that the appellees, Harriet and James Tabler, on the 1st of August, 1902, at Harrison county, state of Indiana, near unto the dwelling and business houses of divers inhabitants of the town of Corydon, in said county and state, unlawfully made, erected, set up and arranged, and did cause and procure to be made, erected, arranged and set up, in a certain room and building in said town of Corydon (describing the room and building), a certain partition, elevator, screens, curtains, revolving waiters, screen sash, blind door, blind window, paraphernalia and other devices for the purpose of unlawfully selling, bartering and giving away intoxicating liquors in less quantities than five gallons at a time, and for the purpose of conducting ³⁹⁵ unlawfully a saloon in said room and building; that they did unlawfully and injuriously, at said date, maintain and permit, and from thenceforth up to and including the time of the making of this presentment do maintain, permit and operate in said

room and building in said town the said partition, elevator, screens, etc., for the purpose of unlawfully and illegally selling, bartering and giving away intoxicating liquors in less quantities than five gallons, and for the purpose of unlawfully conducting a saloon; that by reason of said partition, elevator, screens, etc., intoxicating liquors in less quantities than five gallons at a time are sold, bartered and given away in said room and building, and have been so sold, bartered and given away since the 1st of August, 1902, including Sundays and legal holidays, up to and including the time of the making of this presentment; that said sales are made with the knowledge and consent of said defendants; that they have absolute control over said room in which said devices before described are located, and in which said illegal business is conducted; that said sale of intoxicating liquors can be made with impunity, and said saloon business can be conducted without fear on the part of the defendants of the consequences of selling intoxicating liquors without license, for the reason that said partition, elevators, etc., so screen and hide the seller of intoxicating liquors from the view of the purchaser and view of the public that it is impossible to ascertain who is the seller; that no person has a state license to sell intoxicating liquors in said room and building; that by reason of said partition, elevator, screens, etc., by means of which illegal sales of liquors have been made by and with the consent of the defendants, and by reason of the existence of said illegal saloon maintained by and with the consent of the defendants, and each of them, men are made drunken, and are seen in and about said building, and on the public streets of said Corydon. Men congregate in crowds in and in front of said room and building before described, blocking the sidewalk, using ³⁹⁹ profane, obscene and indecent language, all to the damage, inconvenience, annoyance and injury of divers inhabitants situated and dwelling in said town of Corydon, and near unto said room and building above described. It is further alleged that the people of the town of Corydon are of a high grade of morality, and that until the acts complained of, there was no place in said town where intoxicating liquors could be purchased for a beverage; that by reason of the absence of saloons, Corydon was a more desirable place for business and residence purposes, and that by reason of the acts complained of the town is less desirable either for business or residence purposes, and that said illegal saloon is a public nuisance, con-

trary to the form of statute, etc. It is also alleged that said room and building containing said structures and devices is called and is known to the inhabitants of the town of Corydon as a "blind pig," or "blind tiger."

1. There is no statute in this state making a place where intoxicating liquors are sold a nuisance *per se*, but even a license to sell intoxicating liquors does not protect the holder from the consequences of unlawful practices on the premises, and persons so offending may be liable to a property owner individually damaged: *Haggart v. Stehlin*, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577; *Tron v. Lewis*, 31 Ind. App. 178, 66 N. E. 490; *Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478. In Indiana there are no crimes except those defined by statute: *Stephens v. State*, 107 Ind. 185, 8 N. E. 94, and cases cited.

2. Section 2153 of Burns' Revised Statutes of 1901 (Rev. Stats. 1881, sec. 2065) provides that every person who shall erect and maintain any public nuisance, to the injury of any part of the inhabitants of the state, shall be fined, etc. "The term 'public nuisance,' as used in the statute before quoted [section 2153, *supra*], providing a punishment for maintaining a public nuisance, has a well-defined legal meaning and sufficiently designates ³⁹⁷ the class of prohibited acts": *Gillett's Criminal Law*, 2d ed., sec. 640; *Burk v. State*, 27 Ind. 430. A nuisance is a public nuisance if it annoys such part of the public as necessarily comes in contact with it: *Hackney v. State*, 8 Ind. 494; *Moses v. State*, 58 Ind. 185; *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, ante, p. 190, 72 N. E. 1037; *Paragon Paper Co. v. State*, 19 Ind. App. 314, 49 N. E. 600.

3. "It is well known that a keeper of a 'blind tiger,' in its general acceptance and understanding, means a person engaged in the unlawful sale of intoxicating beverages": *Rush v. Commonwealth*, 47 S. W. 586; *Standard Dictionary*. "The words used in an indictment or information must be construed, in their usual acceptance, in common language": *Burns' Rev. Stats. 1901*, sec. 1805 (*Rev. Stats. 1881*, sec. 1736).

4. The indictment charges, in terms, the keeping of a public nuisance, under which evidence may be properly introduced to show that the public who necessarily came in contact with the conditions set out were annoyed. It avers that the defendants, at the time of the acts charged, had control over said room and building; that they were in control at the time of the making of the presentment. The mere erection of

screens and other devices described in the indictment cannot be said to be, as a matter of law, a nuisance, no matter what the motive of their erection and maintenance may be; but the indictment avers that, by means of said devices, liquors were sold in violation of law, and it is further averred that men are made drunken, and are seen in and about said building and on the public streets of said town of Corydon; that men congregate in crowds in and in front of said room and building before described, blocking the sidewalk, using profane, obscene and indecent language, all to the annoyance, etc. The gravamen of the charge is that the alleged public intoxication, and open, notorious and continuous violation of law, are offenses to decency. A statute of the state of Georgia makes any place ³⁹⁸ commonly known as a "blind tiger," where intoxicating liquors are sold in violation of law, a common nuisance: *Cannon v. Merry*, 116 Ga. 291, 42 S. E. 274.

5. In *Legg v. Anderson*, 116 Ga. 401, 42 S. E. 720, the court holds that a "blind tiger" is a public nuisance independent of said statute. This expression from the learned court, although not binding here, is commended by the able reasoning of the opinion. The maintenance of a public place equipped with devices intended to make the violation of the law comparatively safe from criminal prosecution, and in which it is well known the law is systematically violated, is certain to induce the lamentable results and exhibitions designated in the indictment, and which can only be "offensive to the senses." Such results are not only a nuisance, but a menace to the peace of the community.

The court erred in sustaining the motion to quash the indictment, and the record shows, notwithstanding the claim of the appellee to the contrary, that the state excepted, in substantial compliance with the law, to said action of the court.

The judgment is reversed, with instructions to overrule the motion to quash.

Robinson, P. J., Black, Wiley, Roby and Myers, JJ., concur.

A Place Where Liquor is Sold may amount to a nuisance, though the seller possesses a license: *State v. Hoxie*, 15 R. I. 1, 2 Am. St. Rep. 838; *Haggart v. Stehlin*, 137 Ind. 43, 35 N. E. 997. The legislature has power to declare places where liquor is sold contrary to law to be common nuisances, and to provide remedies for their abatement by summary proceedings: *Ex parte Keeler*, 45 S. C. 537, 55 Am. St. Rep. 785.

BOSTOCK-FERARI AMUSEMENT COMPANY v.
BROCKSMITH.

[34 Ind. App. 566, 73 N. E. 281.]

ANIMALS FERAE NATURAE—Negligence—Presumption.—If a person is injured by an attack of an animal *ferae naturae*, the negligence of the owner is presumed. (p. 261.)

ANIMALS FERAE NATURAE, reduced to captivity are the property of the captor. (p. 262.)

ANIMALS FERAE NATURAE—Right to Transport.—The owner of a bear has a right to transport him from one place to another for a lawful purpose, and it is not negligence per se to lead him along a public street for such purpose. (p. 262.)

ANIMALS—Public Shows—Right to Use of Highway.—The conducting of shows for the exhibition of wild animals is a lawful business, and the mere fact that the appearance of such animal is calculated to frighten a horse of ordinary gentleness, does not deprive the owner of such animals of his lawful right to transport his property along a public street or highway. (p. 262.)

ANIMALS—Use of Street—Negligence.—If a gentle bear is being led along a public street, without making any noise or demonstration and simply following his owner, when a gentle horse takes fright at the bear and injury results to another, the owner of the bear is not guilty of negligence, nor liable for such injury. (p. 263.)

W. J. O'Brien, Jr., J. S. Pritchett, W. T. Douthitt, L. Benson and L. C. Embree, for the appellant.

J. P. Haughton, S. M. Emison, W. A. Cullop, G. W. Shaw and J. T. Hays, for the appellee.

567 COMSTOCK, C. J. The complaint alleges that the plaintiff, while driving in his buggy, was injured in consequence of his horse taking fright from the sight of a bear walking along a public street of the city of Vincennes. The action was begun in the circuit court of Knox county, and, upon change of venue, tried in the circuit court of Sullivan county. The court rendered judgment upon the verdict of the jury in favor of appellee for seven hundred and fifty dollars. The complaint was in three paragraphs. The first was dismissed, and the cause was tried upon the amended second and third paragraphs, to which a general denial was filed.

The errors relied upon are the action of the court in overruling demurrers to said second and third paragraphs, respectively, of the complaint, and overruling appellant's motion for a new trial. Some of the reasons set out in the motion for a new trial are that the verdict was contrary to the law, and was not sustained by sufficient evidence.

The question of the sufficiency of the second paragraph of the complaint is not entirely free from doubt, but we conclude that each of said paragraphs is sufficient to withstand a demurrer.

It is sought to maintain an action for damages resulting from the fright of a horse at the sight of a bear, which his keeper and owner was leading along a public street, for the purpose of transporting him from a railroad train, by which he had been carried to Vincennes, to the point in Vincennes ^{ses} at which the bear was to be an exhibit as a part of appellant's show. It is not claimed, either by allegation or proof, that the show was in itself unlawful; and there is no pretense that the transporting of the bear from one place to another for the purpose of exhibition was unlawful, or in itself negligence. The case is therefore one of the fright of a horse merely at the appearance of the bear while he was being led along the street, was making no noise or other demonstration, and was in the control of his keeper. It appears without contradiction from the evidence that when the horse took fright the bear was doing nothing except going with his keeper. He was muzzled. He had a ring in his nose to which a chain was attached. Said chain was strong enough to hold and control him. He had around his neck a collar about two inches wide and one-half inch thick, to which also was attached a chain. The keeper had both chains in his hand when the accident occurred. The chain connected with the ring in his nose was small. The one connected with his collar was large. It was for the purpose of chaining him at night when he was alone. The chains were strong enough to control the bear. The animal was characterized by the witnesses who knew him as "gentle," "kind," "docile." His keeper testified that he had never known him to be mean or to growl. He testified, also, that he never knew of a bear scaring a horse; that shortly before the accident the keeper met two ladies in a buggy, and their horse did not scare. He was described as of pretty good size and brown. One witness said he was a "large, ugly-looking, brown bear."

When a person is injured by an attack by an animal *ferae naturae*, the negligence of the owner is presumed, because the dangerous propensity of such an animal is known, and the law recognizes that safety lies only in keeping it secure: 2 Am. & Eng. Ency. of Law, 2d ed., p. 351. In the case before us the injury did not result from any vicious propensity of the bear.

He did nothing but walk in the ⁵⁶⁹ charge of his owner and keeper, Peter Degeleih. He was being moved quietly upon a public thoroughfare for a lawful purpose.

We have given the facts that are not controverted. There is also evidence tending strongly to support the claim made by appellant that appellee was guilty of negligence proximately contributing to his injury. Appellant also earnestly argues—supporting its argument with references to recognized authorities—that the owner and keeper of the bear was an independent contractor. But the disposition which we think should be made of the appeal makes it unnecessary to consider these questions. The liability of the appellant must rest on the doctrine of negligence. The gist of the action as claimed by appellee is the transportation of the bear, with knowledge that he was likely to frighten horses, without taking precaution to guard against fright.

1. An animal *ferae naturae*, reduced to captivity, is the property of its captor: 2 Blackstone's Commentaries, *391, *403; 4 Blackstone's Commentaries, *235, *236.

2. The owner of the bear had the right to transport him from one place to another for a lawful purpose, and it was not negligence per se for the owner or keeper to lead him along a public street for such purpose: *Scribner v. Kelley*, 38 Barb. 14; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Ingham on Law of Animals*, p. 230.

3. The conducting of shows for the exhibition of wild or strange animals is a lawful business. The mere fact that the appearance of a chattel, whether an animal or an inanimate object, is calculated to frighten a horse of ordinary gentleness, does not deprive the owner of such chattel of his lawful right to transport his property along a public highway: *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Holland v. Bartch*, 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83; *Wabash etc. R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296; *Gilbert v. Flint etc. Ry. Co.*, 51 Mich. 488, 47 Am. Rep. 592, 16 N. W. 868; ⁵⁷⁰ *Piolett v. Simmers*, 106 Pa. St. 95, 51 Am. Rep. 496. One must use his own so as not unnecessarily to injure another, but the measure of care to be employed in respect to animals and other property is the same. It is such care as an ordinarily prudent person would employ under similar circumstances. This is not inconsistent with the proposition that if an animal *ferae naturae* attacks and injures a person, the negligence of the owner or keeper is presumed. The evidence is that the horse was of ordinary gentleness, but

this fact would not deprive the appellant of the right to make proper use of the street. If the bear had been carelessly managed, or permitted to make any unnecessary noise or demonstration, it would have been an act of negligence.

It is not uncommon for horses of ordinary gentleness to become frightened at unaccustomed sights on the public highway. The automobile, the bicycle, the traction-engine, the steam roller may each be frightful to some horses, but still they may be lawfully used on the public streets. King David said: "An horse is a vain thing for safety." Modern observation has fully justified the statement. A large dog, a great bull, a baby wagon may each frighten some horses, but their owners are not barred from using them upon the streets on that account. Nor under the decisions would the courts be warranted in holding that the owner of a bear, subjugated, gentle, docile, chained, would not, under the facts shown in the case at bar, be permitted to conduct the homely brute along the public streets because of his previous condition of freedom.

In *Scribner v. Kelley*, 38 Barb. 14, the court said: "It does not appear that the elephant was at large, but on the contrary that he was in the care, and apparently under the control, of a man who was riding beside him on a horse; and the occurrence happened before the passage of the act of April 2, 1862, regulating the use of public highways. There is nothing in the evidence to show that the plaintiff's horse was ⁵⁷¹ terrified because the object he saw was an elephant, but only that he was frightened because he suddenly saw moving upon a highway, crossing that upon which he was traveling, and fully one hundred feet from him, a large animate object to which he was unaccustomed—non constat that any other moving object of equal size and differing in appearance from such as he was accustomed to see might not have inspired him with similar terror. The injury which resulted from his fright is more fairly attributed to a lack of ordinary courage and discipline in himself than to the fact that the object which he saw was an elephant."

4. It is alleged in the complaint that the bear was an object likely to frighten a horse of ordinary gentleness, which fact the appellant well knew. There is no evidence that the bear was an object likely to frighten horses of ordinary gentleness, nor that the appellant knew that the bear was an object likely to frighten horses of ordinary gentleness. The evidence shows,

so far as the observation of the keeper and the appellant gave information, that the bear had not frightened horses.

The learned counsel for appellee insist that the appellant was negligent in not having had the proper number of persons in charge of the bear to give warning of the danger; citing *Bennett v. Lovell*, 12 R. I. 166, 34 Am. Rep. 628. In that case the plaintiff and his wife were thrown from their wagon and injured in consequence of the taking fright of their horse at some tubing and machinery which had been left upon a public highway by the defendant, who was carrying the same for the use of the city waterworks. The court held that one who left such an object on the highway without proper precaution cannot be said to be using the due care he ought to use. The court indulges in dicta by way of illustration to the effect that a person moving an animal which, from its appearance, noise or offensiveness, is calculated to frighten human beings, without taking precautions, by having a sufficient number of persons in charge of it to ⁵⁷² warn others of the danger, and, if need be, to aid them in passing it, or who leaves such an object on the highway without proper precautions, cannot be said to be using that due care he ought to use, etc. The facts are not analogous with those in the case at bar. The appellant used the public highway. The animal was gentle, was securely in the control of his keeper, and is not shown to have been an animal which from his appearance, noise or other offensiveness was calculated to frighten horses.

The facts upon the question of negligence are undisputed, and that question is therefore to be determined by the court as a matter of law.

Judgment is reversed, with instruction to sustain appellant's motion for a new trial.

The Owner or Keeper of Wild Animals is usually regarded as liable for the harm or damage they do, regardless of notice of their vicious propensities, or of negligence in their keeping: See the note to *Parsons v. Mauser*, 97 Am. St. Rep. 288.

The Law of the Road is discussed in the monographic note to *Riepe v. Elting*, 48 Am. St. Rep. 366-381.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

**YAZOO AND MISSISSIPPI VALLEY RAILROAD COM-
PANY v. GEORGIA HOME INSURANCE COMPANY.**

[85 Miss. 7, 37 South. 500.]

CARRIERS—Baggage.—Whatever a passenger takes with him, for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as baggage, but only such articles come within that term. (pp. 265, 266.)

CARRIERS—Baggage—Business Papers.—Memoranda and papers carried by an agent in his trunk, but belonging to his principal, and relating exclusively to his business, not designed for the personal use or convenience of the agent, but only as business papers in the transaction of the business of the principal, are not baggage, and the carrier is not liable for delay in their shipment and delivery, when checked as baggage. (p. 267.)

Mayes & Longstreet and J. M. Dickman, for the appellant.

McLaurin, Armstead & Brien, for the appellee.

¹¹ **WHITFIELD, C. J.** Perhaps the definition given by Chief Justice Cockburn in *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. ed. 618, 19 Week. Rep. 873, is as accurate a definition of "baggage" as can be found. That definition is this: "We hold the true rule to be that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal baggage. This would include not only all articles of apparel, whether for use or ornament, but

also the gun case or the fishing apparatus of the sportsman, easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as much by the carrier." The sheets of paper constituting the ¹² memoranda of the agent, Mr. Blackmar, are manifestly papers relating exclusively to the business of his company. We are unable to concur in the view that they can in any proper or legal sense fall within the legal definition of baggage. They are not such things as were for his personal use or his personal convenience. Their use was in no sense personal to the traveler. On the contrary, they were carried, distinctly and exclusively, "for the purposes of business," to quote the definition of Chief Justice Cockburn. They were not legally or properly put as baggage in his trunk, and, not being properly put there as baggage, no damages can be recovered for delay in their shipment in the trunk. It would therefore make no difference whether the suit was one brought for loss of these papers as constituting properly a part of the baggage of Mr. Blackmar or was one "for damages sustained by appellee on a breach of contract, because of the loss of time enforced on appellee's agent by reason of the inexcusable delay of appellant in delivering his trunk." Counsel for appellee say that the suit is of the latter character, and that learned counsel for appellant misconceive it as a suit of the former kind. But whether one or the other, if the memoranda are not properly baggage, nothing can be recovered as constituting the value of the memoranda, nor can anything be recovered as damages for delay in shipping. It must be said that the record is very vague and indefinite in giving an exact description of these memoranda, but it seems clear that the papers were the papers of the master, the insurance company, and not of this agent, and that they were not designed for his per-

sonal use or convenience or comfort, but strictly and distinctly as business papers in the transaction of the business of his master. We think it is clear, on a careful reading of the authorities cited on both sides, that no papers of the latter kind are in any proper or just sense baggage. And we understand this to be the doctrine as declared in *Mississippi Cent. R. R. v. Kennedy*, 41 Miss. 678. The railroad knew nothing about these memoranda¹³ being in the trunk, and it is not a case where the railroad company has consented to receive or accepted these memoranda as baggage knowingly, or in accordance with any usage or custom of the railroad. To hold these papers and documents—so important that their delay for a single day might involve a loss of from ten to fifty thousand dollars to the insurance company; papers and documents concededly the property of the company, and not of the agent; papers and documents which relate exclusively to the conduct of the business of the company, and which are in no way needed for the personal comfort, convenience, or use of the agent—constitute baggage, would be to expand the definition of baggage beyond anything warranted by any well-considered case. We have carefully considered the two strongest cases cited by learned counsel for appellee—*Staub v. Kendrick*, 121 Ind. 226, 23 N. E. 79, 6 L. R. A. 619; and *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. St. Rep. 716—but we do not think either in point here. In the *Gleason* case the book which contained the prices of all the component parts of Sheffield goods was the personal property of the agent, the suit there being for the value of the book specially as such; and so in the other case the suit, again, was for the value of an illustrated catalogue prepared by the agent himself, being his own personal property, estimated to be worth fifty dollars. These cases are much the strongest cited by learned counsel for appellee, but we think the decisive weight of authority, as well as these cases properly considered, would exclude memoranda, such as those involved in this suit, from the category of personal baggage: See *Mauritz v. New York (C. C.)*, 23 Fed. 765, and, for a valuable discussion, *Choctaw etc. R. Co. v. Zwirtz*, 13 Okla. 411, 73 Pac. 941.

It follows that the judgment must be reversed and the case remanded for a new trial. Reversed and remanded.

The Liability of Carriers for the Baggage of passengers is the subject of a monographic note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 343-392. At pages 350-352 of this note will be found a discussion of documents and manuscripts as baggage, and at pages 388, 389, will be found a discussion of baggage in the hands of an agent, which belongs to his principal.

FUGATE v. STATE.

[85 Miss. 94, 37 South. 554.]

WRIT OF ERROR Coram Nobis is Applicable and may issue in criminal as well as civil proceedings in a proper case. (p. 270.)

WRIT OF ERROR Coram Nobis cannot be Invoked in a criminal case for the purpose of revoking the judgment by showing that jurors had formed or expressed opinions unfavorable to the accused. (p. 273.)

Boone & Curlee, for the appellant.

W. M. Cox and W. Williams, attorney general, for the state.

⁹⁷ **WHITFIELD, C. J.** The petitioner was tried and convicted of murder, and sentenced to be hanged, at the February term, 1904, of the circuit court of Prentiss county. From that conviction he prayed and obtained an appeal to this court, which is this day disposed of. After the adjournment of the court, he, in vacation, on the twenty-first day of September, 1904, presented to the circuit judge of that judicial district this petition for writ of error coram nobis, in which, in brief, he seeks to have the judgment of the said circuit court condemning him to death arrested, and all proceedings stayed, until the determination of his petition for this writ of error coram nobis. The grounds upon which he prays for this writ are that three of the jurors (Theodore Linglebeek, Perry ⁹⁸ Majors, and Luther Garner) who tried defendant, had formed and expressed, each, an opinion against the petitioner, although each had denied upon his voir dire that he had formed or expressed any opinion. It is to be specially noted just here that the ninth ground of the motion for a new trial assailed juror Linglebeek for the same reason—to wit, that he had formed and

expressed an opinion; and the tenth ground so assails the juror Luther Garner. It is said, however, by counsel for appellant, that the particular facts on which he was proceeding for a motion for a new trial as to these two jurors were different from those on which he was proceeding as to these same jurors in this proceeding; but it is clear, at all events, that the subject of their disqualification because of the formation and expression of opinions was presented to the circuit court in the motion for a new trial, but no evidence was introduced touching the same, and it was abandoned, so that Perry Majors is clearly the only juror of these three of whom no complaint was made on this score in the circuit court trial.

There is some confusion apparent in the books as to the appropriate office of a writ of error coram vobis and of the writ of error coram nobis. We quote, as the most accurate statement we have seen on this subject, the language of the court in the case of *Teller v. Wetherell*, 6 Mich. 49-51: "When the object of the writ is to remove a judgment from an inferior into a superior court for review and the correction of errors of law or fact, it is called a 'writ of error' only—nothing more. But when the object of the writ is to correct an error of fact in the same court that rendered the judgment, it is called a writ of 'error coram nobis' if it be in the king's bench, and a 'writ of error coram vobis' if it be in the common pleas. A writ of error is an original writ, and in England issues out of the court of chancery, and runs in the name of the king. With us, it issues from this court, and, under our present judicial organization, can issue from no other. It is 'in the nature as well of a certiorari' ⁹⁹ to remove a record from an inferior into a superior court as of a commission to the judges of the superior court to examine the record, and to affirm or reverse it according to law': 2 Saund. 101a. The writs coram nobis and coram vobis differ from a writ of error in two particulars: 1. They contain no certiorari clause, for there is no record to be certified; 2. They have no return day, as they are in the nature of a commission only to the court to correct error. They lie for errors of fact, and for errors in the process, or through the default of the clerks: 1 Archbold's Practice, 234. They do not lie when the error is in the judgment of the court itself, and not in the process: 1 Arch-

bold's Practice, 235. The writ is called a 'writ of error coram nobis' in the king's bench, because the record and proceedings are stated in the writ to remain 'before us' ('coram nobis')—that is, in the court of king's bench: 1 Archbold's Practice, 234; 2 Saund. 101a. The king, by a fiction of law, is supposed to preside in person in that court. In the common pleas, where the king is not supposed to preside, it is called a 'writ of error coram vobis,' because the record and proceedings are stated in the writ to remain 'before you' ('coram vobis')—that is, the king's justices: 2 Tidd's Practice, 1056a, note 'y.' See 'A Writ of Error Coram Vobis in the Common Pleas,' in Archbold's Forms, 243; 2 Dunlap's Practice, 1125. . . . The judgment for plaintiff for an error of fact on a writ coram nobis or coram vobis is that the judgment be revoked; on a writ of error, that it be reversed: *Camp v. Bennett*, 16 Wend. 48."

It is to be observed, as said in *United States v. Plumer*, 3 Cliff. 58, Fed. Cas. No. 16,056, that, apart from the fact that these formal differences designated the particular court in which the judgment was rendered and to which the writ was returnable, they were never of any particular importance, as the office of the writ of error was the same in both courts.

It is perfectly clear, we think, on the authorities, that the writ is applicable to criminal as well as civil proceedings. Says Elliott, J., in *Sanders v. State*, 85 Ind. 324, 44 Am. Rep. 100 29: "This was a very common remedy in civil actions, but was seldom resorted to in criminal cases. Although rarely used in criminal cases, we find it conceded by courts and writers to be an appropriate remedy in criminal prosecutions as well as in civil actions." To the same effect, see *United States v. Plumer*, 3 Cliff. 59, Fed. Cas. No. 16,056; *State v. Calhoun*, 50 Kan. 523, 34 Am. St. Rep. 141, 32 Pac. 38, 18 L. R. A. 838; 5 Ency. of Pl. & Pr. 32, par. 7. Indeed, it is obvious from the very nature and office of the writ that it applies as well to criminal as civil proceedings, in a proper case. For the "office of the writ is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian; or coverture, where the common-law disability still

exists; or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake": 5 Ency. of Pl. & Pr., par. 2. It is true, doubtless, as said by Elliott, J., that the writ "is seldom used in criminal proceedings"; but this results from the necessary differences between the steps usually taken and the mode of procedure in a civil and a criminal trial—in other words, from the inherent differences in the two modes of procedure. Wherever, in any procedure, civil or criminal, a proper case is made for the issuance of the writ, it still exists as at common law, and may still, therefore, be used, unless a statute forbids: 5 Ency. of Pl. & Pr., p. 30. Our own court has so said in *James v. Williams*, 44 Miss. 47. As well said by Cowan, J., in *Smith v. Kingsley*, 19 Wend. 620: "The power, therefore, remains as at common law, except as to the mere form, 'coram nobis resident.' . . . We, therefore, have lost the name of the writ, but nothing more."

As a striking and conclusive illustration of the necessity that the writ, or some substitute for it, should exist in criminal practice, we refer to *Calhoun v. State*, 50 Kan. 523, 34 Am. St. Rep. 141, 32 Pac. 38, 18 L. R. A. 838; *Sanders v. State*, ¹⁰¹ 85 Ind. 324, 44 Am. Rep. 29; and especially to the case of *Ex parte Gray*, 77 Mo. 160. The statute of Missouri provided that, when any person under eighteen years of age was convicted of a felony, he should be sentenced to imprisonment in the county jail, and not in the penitentiary. Gray, though under eighteen years of age when the felony was committed, had been sentenced to the penitentiary at a term of a circuit court, and after the adjournment of the term he filed his petition for this writ to have the judgment set aside; and, it appearing by satisfactory evidence that the fact was as stated, the judgment was revoked, in order that the defendant might be sentenced according to law. This is but one instance illustrative of the necessity of the writ in criminal practice, and a thousand might be conceived.

But whilst the writ is recognized as existing in this state (see *James v. Williams*, 44 Miss. 47; *Fellows v. Griffin*, 9 Smedes & M. 362; *Parkinson v. Waldron*, 7 Smedes & M. 189), there is rarely any occasion to resort to this writ in modern criminal practice, as shown by the observations

in *Pickett v. Legerwood*, 7 Pet. 144, 8 L. ed. 638, where the court say: "It cannot be questioned that the appropriate use of the writ of error coram nobis is to enable a court to correct its own errors—those errors which precede the rendition of judgment. In practice, the same end is now generally attained by motion, sustained, if the case require it, by affidavits; and it is observable that so far has the latter mode superseded the former in the British practice that Blackstone does not even notice this writ among his remedies. It seems that it is still in frequent use in some of the states, and, upon points of fact to which the remedy extends, it might be beneficially resorted to as the means of submitting a litigated fact to the decision of a jury—an end which, under the mode of proceeding by motion, might otherwise require a feigned issue, or impose upon a judge the alternative of deciding a controverted point upon affidavit, or opening a judgment, perhaps to the material prejudice of the plaintiff, in order to let in a plea. But in general, and in the practice of most of ¹⁰² the states, this remedy is nearly exploded, or at least superseded by that of amending on motion. The cases in which it is held to be the appropriate remedy will show that it will work no failure of justice if we decide that it is not one of those remedies over which the supervising power of this court is given by law." Usually, therefore, a simple motion or petition will accomplish the same purpose which the former procedure by way of writ of error coram nobis anciently secured.

Thus far as to the writ, its nature and office, and as to its still existing in criminal practice in this state in rare cases. But the difficulty in securing it in this case lies deeper. It is said in *American and English Encyclopedia of Pleading and Practice*, volume 5, page 29, that "an error of fact, for the purpose of this procedure, does not exist in newly discovered evidence." In *Sanders v. State*, 85 Ind. 329, 44 Am. Rep. 29—by far the most luminous and exhaustive discussion of the subject we have anywhere found—it is said: "It is our opinion that the courts have the power to issue writs in the nature of the writ coram nobis, but that the writ cannot be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law—the motion for a new trial and the right of appeal—and these

very materially abridge the office and functions of the old writ. These afford an accused ample opportunity to present for review questions of fact arising upon or prior to the trial, as well as questions of law, while at common law the writ of error allowed him to present to the appellate court only questions of law. Under our system, all matters of fact reviewable by appeal or upon motion must be presented by motion for a new trial, and cannot be made the grounds of an application for the writ coram nobis. Within this rule must fall the defense of insanity, as well as all other defenses existing at the time of the commission of the crime. Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters." We think this a sound declaration of the present office and scope of this writ, from ¹⁰³ which it necessarily follows that it cannot be invoked in our practice for the purpose of revoking the judgment by showing that jurors had formed or expressed opinions unfavorable to the defendant. Such assailment of the integrity of the trial jury, for reasons clearly apparent, was never within the scope and office of this writ. Without reference, therefore, to the question whether an appeal would lie from the action of the circuit judge denying this writ in vacation, it is enough to say that, if such an appeal does lie, the writ was properly denied. Because of the confusion existing as to the law touching this writ, we have gone somewhat fully into the matter, and attempted to make clear the present use and scope of this writ in the criminal practice of this state.

Affirmed.

Writs of Error Coram Nobis and writs of error coram vobis are discussed at length in the monographic note to *Collins v. State*, 97 Am. St. Rep. 362-372.

Am. St. Rep., Vol. 107-12

LEATHERBURY v. McINNIS.

[85 Miss. 160, 37 South. 1018.]

COTENANCY—Waste—Injunction.—If a cotenant is guilty of malicious waste tending to the destruction of the chief value of the property, his cotenant is entitled to an injunction restraining it. (p. 274.)

COTENANCY—Waste—Injunction.—If one cotenant is guilty of waste in proceeding to destroy the timber on the common property, which constitutes its chief value, his cotenant is only entitled to an injunction restraining him from destroying more than one-half of such timber in value and quantity, in the absence of proof that the timber on one part of the tract is of more value than that on any other part. (p. 274.)

Ford & White, for the appellants.

C. H. Wood, for the appellee.

¹⁶³ **WHITFIELD, C. J.** The appellants and appellee appear, so far as the testimony has progressed, to be tenants in common of a tract of land embracing something like one thousand and forty acres. According to the testimony thus far developed, the almost exclusive value of the land consists in the pine trees standing on it. The appellants have boxed the trees on one hundred and twenty acres, and have declared their purpose to box ¹⁶⁴ the trees on the entire tract. The chancellor must have believed from the testimony that this waste was unusual and unreasonable in its nature, malicious, and tending to the destruction of the chief value of the property. We are not prepared to say that he is clearly wrong in this conclusion of fact, and if the facts be so, then the injunction was properly granted: Freeman on Cotenancy and Partition, sec. 323. But there is nothing to show that the timber on one part of the tract is of any more value than that on any other part of the tract, and there is no reason why, in partition proceedings, the court could not set apart to the appellants that half of the land embracing the said one hundred and twenty acres. For these reasons, we think the injunction should have been limited so as to restrain the appellants from boxing any more than one-half, in value and quantity, of the trees.

The decree is reversed and the cause remanded, with instructions to the court below to modify and perpetuate injunction as indicated in this opinion.

A Tenant in Common who cuts and removes timber from unoccupied lands is answerable to his cotenant in an action on the case: *Benedict v. Torrent*, 83 Mich. 181, 21 Am. St. Rep. 589. According to *Mott v. Underwood*, 148 N. Y. 463, 51 Am. St. Rep. 711, however, a court of equity will not interfere between cotenants, even to restrain waste, unless it is of a malicious character or so unusual or unreasonable as to constitute a wanton destruction of the estate. As to the right in general to an injunction against the cutting of timber, see the extended note to *Moore v. Halliday*, 97 Am. St. Rep. 748-750.

WOODSON v. HOPKINS.

[85 Miss. 171, 37 South. 1000.]

CONTRACTS—Illegal—Enforcement.—Neither a court of law nor of equity will entertain a suit by either party to an illegal contract against the other, when the contract is against public policy, whether it is executory or executed. (p. 284.)

CONTRACTS—Illegal—Recovery on Transaction Growing Out of.—Whenever a party seeking to recover is obliged to make out his case by showing an illegal contract, or through the medium of such contract or when it appears that he was privy thereto, he is not entitled to recover any advance made by him in connection therewith, or money due him as profits derived therefrom, but when the advances have been made upon a new contract remotely connected with the illegal contract, and the title or right of the party to recover is not dependent upon that contract, and his case may be proved without reference thereto, he is entitled to recover. (p. 285.)

CONTRACTS—Illegal—Accounting.—If several persons as coparties enter into an illegal contract which is executed and one of such coparties receives the profits of the contract, the courts will not compel him to account to the other coparties for their share of such profits. (p. 287.)

CONTRACTS—Illegal—Accounting.—One party to an illegal contract can have no accounting from the other, where he must call in the aid, directly or indirectly, of the illegal contract to make out his case. (p. 287.)

CONTRACTS—Illegal—Partners. no more than others, can enforce contracts against public policy, whether they are executed or merely executory. (p. 287.)

McLaurin & Thames and McLaurin, Armistead & Brien, for the appellant.

Catchins & Catchins and W. J. Vollar, for the appellee.

¹⁷⁸ **WHITFIELD, C. J.** The case made by the record is briefly this: That a certain Dr. Hopkins, of Atlanta, Georgia, was the owner of a number of loan agencies in various states; a number in Memphis, Tennessee, and a number in Vicksburg, Mississippi. They were conducted under assumed

names: Cobb & Company, Shaw & Company, Mathis & Company, etc. Shaw & Company was the assumed name given to the office of Hopkins conducted by S. T. Woodson, as agent, in Vicksburg. The business consisted in loaning money in small sums to necessitous and ignorant people, mostly negroes; and this name of Shaw & Company was taken, evidently, for the purpose of preventing any borrower from suing to recover back usury paid, and was a disguise to hide the real person who had collected the usurious interest. This interest amounted to thirty-five per cent per week. A borrower, for example, would borrow, say, ten dollars, and thirty-five per cent amounted to three dollars and fifty cents, which would be added to the ten dollars loaned, making thirteen dollars and fifty cents, and this sum of thirteen dollars and fifty cents would form the consideration of a bill of sale of the borrower's household effects, and was required to be paid in one week. This unconscionable business seems to have resulted in large profits to Hopkins. Woodson claims, and ¹⁷⁹ proves, by himself and a witness, Chaney, that he made an agreement with Hopkins, when last in Vicksburg, that upon the payment to Hopkins of two thousand three hundred dollars, the business of Shaw & Company should become the property of Woodson; and Woodson testified that Hopkins only put in something over one thousand dollars originally, and that on the 7th of April, 1904, he had drawn out the sum of two thousand three hundred dollars, and that by the terms of the agreement he then took the business and property of Shaw & Company, and declined to further account to Hopkins after that date. He also in his answer alleged that there were no executed transactions from which any money arose, and remained in his hands at the time of this suit, that he by law could be required to account to Hopkins for; and Hopkins, of course, wholly denies all the statements with respect to the purchase of the business. This suit was brought by him in the chancery court of Warren county against Woodson to recover moneys alleged to be the result of this business and remaining in Woodson's hands for him. Hopkins had Woodson arrested and imprisoned, and undertook to take charge of the business, and sued out an injunction against Woodson and others, enjoining them from having anything to do with the alleged property of Shaw & Company, and restraining them from collecting any of the amounts of money alleged to be due Shaw & Company, and from using the office

in which the business had been transacted. Hopkins afterward amended his bill, and the prayer of the bill was as follows:

“Complainant therefore prays that, pending this suit, a receiver may be appointed by this honorable court with full authority to take charge of all of the property which was used in and about the business of said Shaw & Company, including all office furniture and fixtures and all of the books and accounts and evidences of indebtedness belonging to or used in connection with the said business of Shaw & Company, and of the office in which said business was conducted, and that the defendants, S. T. Woodson, W. H. Sublett, and A. J. Gebhardt, or either of them who may have the same in his custody, may ¹⁸⁰ be commanded and directed forthwith to deliver and turn over to the said receiver all property of every sort and description whatsoever pertaining to or growing out of the said business conducted under the name of Shaw & Company, as aforesaid, including all books, accounts, memoranda, route cards, and other evidences, showing what loans were made and to whom made, and what amounts have been paid thereon, and what amounts remain due thereon, and the places of residence of the persons making such loans from said Shaw & Company, and that said receiver be authorized and empowered to take and receive all of said property, and that he be directed to collect, as conveniently as may be, all sums of money which may be due and owing, as having been borrowed and obtained from the said Shaw & Company, and that he retain in his possession, to abide the final determination of this suit, the said office and all sums so collected by him, and all other property of every description which may come into his possession, as having pertained to the business of said Shaw & Company, directly or indirectly, until further order by this court.”

Part of this prayer calls for, it will be observed, a direction that the receiver shall collect all sums of money which may be due and owing Shaw & Company, and the turning over to the said receiver of all books, accounts, etc., showing what loans were made, to whom made, what amounts had been paid thereon, what amounts remained due, and the places of residence of the persons making such loans. The final decree is as follows:

“Ordered, adjudged, and decreed that the injunction heretofore issued herein against the said defendants, S. T. Wood-

son, W. H. Sublett, and A. J. Gebhardt, be, and the same is hereby, made perpetual. It is further ordered, adjudged, and decreed that the said defendants deliver to the complainant herein, within ten days after the date of this decree, all books, memoranda, route cards, accounts, or evidences of indebtedness, and all other property of any and every sort and description which came into their possession, or into the possession of either ¹⁸¹ of them, as managers, agents, or employés in and about the business heretofore established in the city of Vicksburg, Mississippi, by the complainant under the name and style of Shaw & Company, and that they also pay over to the complainant all moneys which may have been collected by them growing out of the management and control by them of the business so conducted under the name of Shaw & Company."

The answer sets up the defense that the contract between Hopkins and Woodson, and these usury contracts—so extortionate as to shock the moral sense upon mere statement—were illegal and violated the public policy of this state, and that the bill, consequently, should not be maintained, but that the court of conscience, on well-settled principles, would leave these plunderers where it found them. Undoubtedly, the usury contracts, to the extent of the usury, were illegal and against public policy: 15 Am. & Eng. Ency. of Law, 939e. But aside from this feature, we hold, without hesitation, that no such robbing contracts as this record discloses can be other than against the public policy of the state, on account of their extortionate character. In 15 American and English Encyclopedia of Law, page 933, paragraph 4, subdivision 2, it is said: "While the chief sources for determining the public policy of a nation are its constitution, laws, and judicial decisions, still, however, these are not the sole criteria, and the courts should not hesitate to declare a contract illegal merely because no statute or precedent prohibiting it can be found."

We approve this as sound doctrine strictly applicable to the case made by this record. The true doctrine as to the inability of either party to a contract against public policy being permitted to invoke the aid of a court of law or equity is thus stated in the same authority (pages 998, 999, 1001): "Where illegal contracts are executed by the parties, then the same principle of public policy which leads courts to refuse to act when called upon to enforce them will prevent

the court from acting to relieve either party from the consequence of the illegal transactions. In such cases the defense of illegality prevails, not as a ¹⁸² protection to the defendant, but as a disability in the plaintiff. The court does not give effect to the contract, but merely refuses its aid to undo what the parties have already done." "The fact that the party seeking to enforce executory provisions of an illegal contract, though they consist only of promises to pay money, has performed the contract on his part, and that, unless the other party is compelled to perform, he will derive a benefit therefrom, will not induce the court to enforce such provisions. Nor can the party performing, on his part, the provisions of an illegal contract, recover on the ground of an implied promise on the part of the party receiving the benefits therefrom to pay therefor, as the law will imply no promise to pay for benefits received under an illegal contract by reason of the performance thereof by the other party."

The same doctrine is admirably stated in 9 Cyclopaedia of Law, 546: "No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxim, 'Ex dolo malo non oritur actio,' and in 'In pari delicto potior est conditio defendentis.' The law, in short, will not aid either party to an illegal agreement; it leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed, in whole or in part, by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the rule refusing relief to either party to an illegal contract, where the contract is executed, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of, or relief from, the illegal agreement. While it may not always seem an honorable thing to do, yet a party to an illegal agreement is permitted to set up the illegality as a defense, even though it may be alleging ¹⁸³ his own turpitude. Money paid under an agreement which is executed, whether as the consideration or in performance of the promise, cannot be recovered back where the parties are in pari delicto. And goods delivered or lands

conveyed under an illegal agreement are subject to the same rule. Courts will not, even with the consent of the parties, enforce an illegal contract. And it would seem to follow that an illegal agreement cannot be rendered legal by ratification. An agreement void as against public policy cannot be rendered valid by invoking the doctrine of estoppel."

The distinction has been sought to be drawn, but only in some few cases, to the effect that, if a contract has been executed and one of the parties has the avails, all the harm that can be done to public policy has been done, and the party having the avails can be compelled to pay over the whole of them, or a proportionate share of them, to the other party. In 15 American and English Encyclopedia of Law, 1011, it is stated as to partnership, "In some cases, however, the proposition has been advanced that, if the illegal purpose of the partnership has been accomplished, the courts may direct a division of the proceeds"; but the text repudiates this as unsound. *Gilliam v. Brown*, 43 Miss. 641, is one of the cases holding this repudiated view. The Cyclopedia of Law states the same doctrine as the American and English Encyclopedia of Law on this subject, noting, however, that there are "a number of decisions" holding like *Gilliam v. Brown*, 43 Miss. 641, but that is not the true view, saying, at page 559: "Theoretically, it is said by a recent writer, there is a distinction between enforcing an illegal contract and enforcing a duty not springing from the contract, but arising solely from the receipt of the money or goods. But practically it is impossible to reconcile the actual decisions on this point. A number of courts have refused to allow a recovery by a principal or partner in an illegal enterprise, on the ground that to do so would be to enforce, or at least to recognize, the illegal agreement"—and in a note appends a masterly statement of the true doctrine by ¹⁸⁴ Jessel, M. R., in *Sykes v. Beadon*, 11 Ch. Div. 170: "The notion that because a transaction which is illegal is closed, therefore a court of equity is to interfere in dividing the proceeds of the illegal transaction, is not only opposed to principle, but to authority—to authority in the well-known case of the highwaymen, where a robbery had been committed, and one highwayman unsuccessfully sued the other for the division of the proceeds of the robbery. So in the case he puts of one of two partners engaged in merchant trade. As I read it, he meant the trade of smuggling goods. If two persons go partners as smugglers, can one maintain

a bill against the other to have an account of the smuggling transaction? I should say, certainly not. It is not sufficient to say that the transaction is concluded, as a reason for the interference of the court. If that were the reason, it would be lending the aid of the court to assert the rights of the parties in carrying out and completing an illegal contract. If the partnership is for the purpose of smuggling, that is an illegal contract, and the court cannot maintain it, and the court will not lend its aid at all to it. That reasoning, then, of Lord Cottenham is not sufficient, and I should have answered the question, not as Lord Cottenham does, in the affirmative, but in the negative. I do not say that this observation at all affects the authority of *Sharp v. Taylor* as it stands, but I think it does affect very much the dicta which I have read from the judgment, and that is the reason I have read them. It is no part of the duty of a court of justice to aid either in carrying out an illegal contract or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract. In my opinion no action can be maintained for the one purpose more than for the other."

The doctrine thus stated by that great jurist is also put unanswerably in *Hoffman v. McMullen*, 83 Fed. 372, 28 C. C. A. 178, 48 U. S. App. 96, 45 L. R. A. 410. See, also, 11 *Century Digest*, sec. 693, and authorities; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108, 38 S. W. 343, 36 ¹⁸⁵ L. R. A. 174; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203.

The test in all such cases is correctly stated in 15 *American and English Encyclopedia of Law*, 934, as follows: "Where a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract, and not its actual result."

This demonstrates the utter fallacy of the statement in *Gilliam v. Brown*, 43 Miss. 641, that where such a contract has been executed, the courts will entertain a suit, because "all the harm that can be done to public policy has already been done." This is a gross misconception of the spirit of the rule. The courts leave violators of the law, as they ought to be left, in the condition where they find them. They are repelled by the courts because of the great supervening principle of public policy involved, without reference to the attitude

which one of the parties may occupy to the other, where both are in *pari delicto*. As pungently put in *Hoffman v. McMullen*, 83 Fed. 372, 28 C. C. A. 78, 48 U. S. App. 596, 45 L. R. A. 410: "Courts are not organized to enforce the saying that 'there is honor among wrongdoers,' and the desire to punish the man that fails to observe this rule must not lead the court to a decision that such persons are entitled to the aid of courts to adjust their differences arising out of, and requiring an investigation of, their illegal transactions."

The true doctrine was correctly put long ago in *Wooten v. Miller*, 7 Smedes & M. 386, the court saying: "We have nothing to say in behalf of the morality of the transaction nor in favor of those who make the defense; but as they interpose the law as a shield, we cannot do less than say it covers and protects them." And again in *Deans v. McLendon*, 30 Miss. 343, where the court said: "Courts of justice, in the observance of these rules, are not influenced by any considerations of respect or tenderness for the party who insists upon the illegality of a contract, but exclusively by reasons of public policy. The object ¹⁸⁴ is to punish the active agent in the violation of a law by withholding from him the anticipated fruits of his illegal act, and thus, by deterring all persons from violating its mandates, to give sanctity to the law and security to the public." And in *McWilliams v. Phillips*, 51 Miss. 196, where the court say: "If both, however, concur in the illegal act and are in equal fault, the modern doctrine is that a court will not entertain the claim of either against the other to carry into effect the illegal contract." And in *Williams v. Simpson*, 70 Miss. 115, 11 South. 689. We call special attention to the fact that in every one of these four Mississippi cases the contract was an executed one, the last one being the case of a merchant who merely failed to pay a sufficient privilege tax, and the one in 51 Mississippi, a case where a liquor dealer had simply failed to pay the required tax—cases where the acts were merely *mala prohibita*. The extraordinary circumstance about the case in 51 Mississippi is that the opinion was delivered by the same judge who delivered the opinion in *Gilliam v. Brown*, in 43 Miss. 641. In the case in 51 Miss. 197, the retail liquor dealer's case, Judge Simrall, speaking for a unanimous court, said: "All the parties participating in the violation of the law are in *pari delicto*. In such cases the courts will not, where the contract has been executed, interfere for the relief

of either party, but will leave them in their respective conditions. Where a contract is executory, they will likewise refrain from lending aid to carry it into effect." And a few lines below, Judge Simrall says that this doctrine, where the contract has been executed, as well as where it is executory, is the modern doctrine. We quite agree with this last statement, and the marvel is that whilst the case in 51 Mississippi thus squarely overrules Gilliam v. Brown, 43 Miss. 641, eight volumes before, in 43 Mississippi, no allusion is made to the overruled case. It will thus be seen that in the four Mississippi cases cited above in 7 Smedes & M., in 30 Mississippi, in 51 Mississippi, and in 70 Mississippi (11 South.), the doctrine—the true modern doctrine—is declared to be in accordance with the excerpts we have made ¹⁸⁷ from the American and English Encyclopedia of Law and the Cyclopedic of Law, supported by innumerable citations, that neither a court of law nor a court of equity will entertain a suit by either party to a illegal contract against the other, where the contract is one against public policy, whether executed or executory.

It is true that in the case of *Howe v. Jolly*, 68 Miss. 323, 8 South. 513, and in the case of *Andrews v. New Orleans Brewing Co.*, 74 Miss. 362, 60 Am. St. Rep. 509, 20 South. 837, the court followed *Gilliam v. Brown*, 43 Miss. 641; but it is also true that those cases limped along after that case, without the citation of a single authority and without a single line of reasoning, when, if the court had simply examined the four cases referred to in our reports, and especially the case in 51 Mississippi, it would have seen that *Gilliam v. Brown*, 43 Miss. 641, had been overruled, and the doctrine of 7 Smedes & M. and 30 Mississippi reinstated as to executed contracts; and it would have also noted the pregnant fact that the judge who wrote the opinion in 43 Miss. 641 apologized for it in 51 Mississippi by saying that the view established in Mississippi before the case of *Gilliam v. Brown*, 43 Miss. 641, reinstated, and thoroughly approved in the cases we have referred to in 51 Miss. 196, and 70 Miss. 113, 11 South. 689, was the "true modern doctrine." *Gilliam v. Brown*, 43 Miss. 641, having thus manifestly been overruled by these two last-named cases, the two cases in 68 Miss. (8 South.) and 74 Miss. (60 Am. St. Rep., 20 South.), having inadvertently followed an overruled case, we declare the law in Mississippi now to be as it was stated to be in the four cases: Hoover

v. Pierce, 26 Miss. 627; 30 Miss. 343; 51 Miss. 196; and 70 Miss. 113, 11 South. 689—viz.: That neither a court of law nor a court of equity, in this state, will entertain a suit for relief by either of two parties in *pari delicto* against the other, where the contract is against public policy. The plain truth is, on principle, that the contrary doctrine holds out a premium to those who violate the law, since, according to that doctrine, if they can only hurry fast enough ¹⁸⁸ to consummate their villainy, the law will help one to get from the other his part of the stolen plunder. In further demonstration of the inaccuracy of the opinion in *Gilliam v. Brown*, 43 Miss. 641, we call attention to two other misstatements of the law therein contained. It is said at page 660 of that opinion: "A bond or deed made for a past cohabitation is good." The American and English Encyclopedia of Law, volume 15, page 961, says: "This obligation on the part of the man, however, cannot rise above a moral obligation on his part; and as a moral obligation is, as a rule, insufficient to support a contract, it is therefore held by the weight of authority that past cohabitation alone is not sufficient consideration for a promise, not under seal, by the man to remunerate the woman."

The other misconception is in confusing the case of a suit by one of two parties to an illegal contract against the other with a suit by one of the parties against a third party, no way connected with the illegal contract, to collect money paid by the other party to the illegal contract, which has been executed to such third person for the use of the party suing. This principle is clearly stated at page 1007, volume 15, of American and English Encyclopedia of Law, paragraph 9, and it is stated there, with great exactitude of statement, that the reason that the third person cannot defend an action by the latter is "that in such a case the action is not based on the illegal contract, but, instead, upon the independent contract of such third person to deliver over the property received by him."

The same principle is also clearly stated in 9 Cyclopaedia of Law, 563. In all such cases the case is made out independently of any reference to the illegal contract; the suit is on a new promise based upon a new consideration. A striking statement of the principle is found in note 96, page 560, of the latter authority, where it is said: "The status of such a case has been well put thus: Two men enter into a conspiracy

to rob on the highway, and they do rob, and while one is holding the traveler the other rifles his pockets of one thousand dollars, and then refuses to divide, ¹⁸⁹ and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now, if these robbers had taken the one thousand dollars and invested it in some legitimate business as partners, and had afterward sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money; that would have been a past transaction, not necessary to be mentioned in the settlement of the new business."

In the unanswerable opinion of Hawley, district judge of the United States circuit court of appeals, *Hoffman v. McMullen*, 83 Fed. 372, 28 C. C. A. 178, 48 U. S. App. 596, 45 L. R. A. 418, the doctrine is thus stated: "In support of these views, the court quotes in extenso from *Sharp v. Taylor*, 2 Phill. Ch. 801, which closed the statement that 'the difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant v. Elliott*, 1 Bos. & P. 3, 4 N. W. 755, and *Farmer v. Russel*, 1 Bos. & P. 296, and recognized and approved by Sir William Grant in *Thomson v. Thomson*,' 7 Ves. Jr. 420, 6 N. W. 151, thus clearly indicating the class of cases to which the case then under consideration belongs. The distinction between the cases where a recovery can be had, and the cases where a recovery cannot be had, of money connected with an illegal transaction, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract, or money due him as profits derived from the contract; but that when the advances have been made upon a new contract remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not ¹⁹⁰ dependent upon that contract, and his case may be proved without reference to it, then he is entitled to recover."

The distinction between the class of cases is clearly set forth in *Thomson v. Thomson*, 7 Ves. Jr. 470, 6 N. W. 151. The master of the rolls, after declaring that the agreement there under consideration was illegal, said: "There is an equity against the fund, I admit, if you can get it by a legal agreement. The defense is very dishonest, but in all illegal contracts it is against good faith, as between the individuals, to take advantage of that. A man procures smuggled goods and keeps them, but refuses to pay for them. So, in the underwriter's case, an insurance contrary to the act of parliament, the brokers had received the money and refused to pay it over, and it could not be recovered. No matter who complains of it, the thing is illegal. You have no claim to this money except through the medium of an illegal agreement, which, according to the determinations, you cannot support. I should have no difficulty in following the fund, provided you could recover against the party himself. If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing his trust. *Tenant v. Elliott*, 1 Bos. & P. 3, 4 N. W. 755, is, I think, an authority for that. But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then how are you to get at it except through this agreement? There is nothing collateral in respect of which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences. Here you cannot stir a step but through that illegal agreement, and it is impossible for the court to enforce it."

As remarked in this last citation, in the case at bar, as in the case of *Thomson v. Thomson*, 7 Ves. Jr. 470, 6 N. W. 151, the payment to Woodson, the agent, was payment to Hopkins.

The third mistake in the opinion of *Gilliam v. Brown*, 43 Miss. 641, is the ¹⁹¹ statement that one partner in the case of an executed contract, with the avails of an illegal contract in his hands, may be made to account to the other partner for his proportionate part. In 15 *American and English Encyclopedia of Law*, paragraph 10, page 1008, it is said: "Where several persons as coparties enter into an illegal contract, which is executed, and one of such coparties receives the profits of the contract or fund raised by such contract, it

has been held that the courts will not compel him to account to the other coparties for their share of such profits, as their right to share therein is undoubtedly based upon the illegal contract, and permitting the recovery of their shares would be an enforcement of a part of such contract." And at page 1011, paragraph 2, the same doctrine is announced.

We may also observe, in passing, that in American and English Encyclopedia of Law, 1010, note 3, *Wooten v. Miller*, 7 Smedes & M. 380, is cited as holding: "That if an agent transacts the illegal business without disclosing the fact of his agency, and the money is paid to him in his own right, and not as an intermediary or agent, he cannot be compelled to account therefor to his principal, for the reason that the principal could not show his title to the property except through the illegal contract."

And the principle is universal that one party to an illegal contract can have no accounting from the other, where he must call in the aid, directly or indirectly, of the illegal contract to make out his case. It is curious to note in 15 American and English Encyclopedia of Law, 1012, that some courts have held that "where the illegal business transacted by the partnership results in losses, and one of the partners has advanced more than his proportion, he cannot force the other partners to reimburse him." This strengthens the position that partners, no more than others, can enforce contracts against public policy, executory or executed. This last statement of the principle as to recovery of losses is the mere complement of the other as to the recovery of profits.

A careful reading of the pleadings and the record, the evidence and the decree, in this case, makes it plain that this suit ¹⁹² cannot be maintained, except by the use and through the aid of the illegal contract itself, and that, in effect, a decree of affirmance would be a decree assisting in the carrying forward of this unconscionable and illegal scheme.

Reversed and bill dismissed.

¹⁹⁵ RESPONSE TO SUGGESTION OF ERROR.

WHITFIELD, C. J. It is said in the suggestion of error that our opinion "is to the effect not only that the contracts of loan which appellant ¹⁹⁶ made with the customers of the concern were illegal and void because usurious, but that the illegality of these contracts must be imputed back to the contract of employment by virtue of which appellant got

possession of appellee's funds, and being so imputed back, so infect this contract of employment as to render it also illegal and utterly void.'" Learned counsel misconceive. We did not declare these contracts—either the one between Woodson and Hopkins, or those between Woodson, as agent for Hopkins, and borrowers—unenforceable because merely usurious. We expressly said that they were so declared because they were unconscionable, so highly extortionate as to shock the conscience upon the mere statement of them; and we referred to 15 American and English Encyclopedia of Law, page 933, paragraph 4, subdivision 2, for authority. We said nothing at all about the mere usurious nature of the contract except that, to the extent of usury, it was, of course, illegal. Again, it is said Hopkins "is not permitted to reclaim the very books of account and office furniture, but is subjected to a complete forfeiture," etc., and "that this penalty is imposed upon him at the instance, not of the borrowers, whom alone the usury statutes were intended to protect, but upon the plea of a third person, with whose welfare the statutes on the subject of usury have no concern." There is no question of forfeiture in the case. It is a case of inability to sue. Hopkins has placed himself in a position where he cannot call upon a court of conscience to enforce his demands, because they are against public policy, by reason of their iniquitous and extortionate character; and this penalty, if it be a penalty, is self-inflicted, and his contracts are declared unenforceable in any court in this state not because they are usurious, but because they are so utterly oppressive and extortionate as that no court should enforce them. It is said again in the suggestion of error "that, if it be true that this business was so extortionate as to shock the moral sense upon mere statement, the court should not therefore permit itself to be led by this fact into the imposition of a different penalty than that provided by the statute; that under the ¹⁹⁷ statute no greater penalty can be imposed for the charging of one thousand per cent interest than for the charging of eleven per cent interest." This discloses a failure on the part of counsel to apprehend accurately the exact ground on which the opinion proceeded, and, indeed, this misconception pervades the entire suggestion of error. The mistake learned counsel make is in not distinguishing between a contract merely usurious and a contract, like this one, which not only provides a rate of interest so outrageous

that the mere usury feature is lost in the grossness of its general iniquity, but also provides bills of sale on all household effects, kitchen furniture, etc., of necessitous borrowers, under which property worth, it might be, a hundred times the loan, may be confiscated in a week's time. It is not a case of ordinary usury, but a case of extraordinary wrong and oppression. Again, counsel say: "Under the statute, no greater penalty can be imposed for the charging of one thousand per cent interest than for the charging of eleven per cent interest." Most true, "under the statute." But we are not dealing with this case under a usury statute merely. We are dealing with this case as what it clearly is—to wit, a case in which the usury statute is a mere guise, under cover of which the helpless and defenseless may be robbed by contracts unenforceable because against public policy, not for that they are usurious, but for that they result in gross wrong and oppression of the weak and defenseless, whom courts were established to protect.

Learned counsel do not so much urge that the case (*McWilliams v. Phillips*) in 51 Miss. 196, does not overrule *Gilliam v. Brown*, in 43 Miss. 641, for they style the opinion in 51 Mississippi "inconclusive and contradictory," as that *Gilliam v. Brown* has been followed in the other cases to which we referred as limping lamely after *Gilliam v. Brown*, and also in three other cases referred to by them: *Walker v. Jeffries*, 45 Miss. 160; *Gary v. Jacobson*, 55 Miss. 207, 30 Am. Rep. 514; *Knut v. Nutt*, 83 Miss. 365, 102 Am. St. Rep. 452, 35 South. 686. As to the first case (45 Miss. 160), the opinion was delivered by *Tarbell, J.*, and merely followed ¹⁹⁸ *Gilliam v. Brown*, prior to the case in 51 Mississippi, which overruled it. As to the second of the above cases (*Gary v. Jacobson*), that was a case of fraudulent conveyance assailed by creditors, and wholly out of point in this discussion. The court pointed this out at page 207 of 55 Mississippi (30 Am. St. Rep. 514), saying: "There is a manifest distinction between conveyances in fraud of creditors, and offenses against the penal law. By one the body politic, the sovereign commonwealth, is wronged; by the other, those only who have an interest in undoing the fraud, and this number is limited in our state to pre-existing creditors." And the case at bar is of the class named as being against public policy. In the third case (*Knut v. Nutt*), after deciding the case on the right ground, it is true the case of *Gilliam v. Brown* was

cited, but that case (*Knut v. Nutt*) went off on a ground wholly independent of the doctrine of *Gilliam v. Brown*. That ground was this: That in order to disconnect the government from quarrels between claimants and their attorneys, growing out of the transfers or assignments of claims, or interests therein, and powers of attorney for receiving payment of the same, section 3477 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 2320), provided that all such transfers, etc., should be void unless made after the allowance of such claims. In the *Knut* case the government had paid the money, and had nothing to do with the contest between counsel and his client subsequently arising. The purpose of the government, as stated expressly in the *Knut* case, was to provide by this section (section 3477) for ridding itself of all inconveniences arising out of claims transferred before it had paid the money. It resulted from the statute that the government and its department officers ceased to be involved in injunction and other embarrassing legal procedure, and established for itself, as stated in the *Knut* case, an easy system of bookkeeping between itself and the claimants direct. The claim having been allowed, and the amount paid by the government, its books were closed, and it had nothing to do ¹⁸⁹ with subsequent troubles between counsel and client; and this is our holding in the *Knut* case, and it is perfectly obvious that the doctrine of *Gilliam v. Brown* had nothing to do with that holding.

Suggestion of error overruled.

If the Parties to an Illegal Transaction are in *particeps criminis*, the law will aid neither to enforce the contract while executory, nor, where executed, will it aid either to place himself in *statu quo* by rescission, but will, in both cases, leave the parties where it found them: *Stevens v. Cincinnati Times-Star Co.*, 72 Ohio St. 112, 106 Am. St. Rep. 586. See, too, *White v. Commercial etc. Bank*, 66 S. C. 491, 97 Am. St. Rep. 803; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Bradfeldt v. Cooke*, 27 Or. 194, 50 Am. St. Rep. 701. Equity may grant relief, however, where both parties to a contract, though in *delicto*, are not in *pari delicto*: *Manchester etc. R. R. Co. v. Concord R. R.*, 66 N. H. 100, 49 Am. St. Rep. 582; *Bell v. Campbell*, 123 Mo. 1, 45 Am. St. Rep. 505. As to the right of one of the parties to an illegal transaction to retain the profits thereof, see *Andrews v. New Orleans Brewing Assn.*, 74 Miss. 362, 60 Am. St. Rep. 509, and cases cited in the cross-reference note thereto; note to *Central etc. Safe Deposit Co. v. Respass*, 99 Am. St. Rep. 326-329.

BOLEN v. LILLY.

[85 Miss. 344, 37 South. 811.]

HOMESTEADS—Conveyance—Nonjoinder of Wife.—A conveyance of a homestead or of any part of it, by the owner, without his wife's joinder, is void, and ejectment lies by the vendor to recover it. (p. 292.)

HOMESTEADS—Conveyance—Nonjoinder of Wife—Estoppel. A conveyance of a homestead without the joinder of the wife of the owner is void, and the warranty clause therein creates no estoppel against the vendor. (p. 292.)

R. V. Fletcher, for the appellant.

Fontaine & Fontaine, for the appellees.

³⁴⁶ CALHOON, J. The court peremptorily instructed the jury to find a verdict for the defendants in the state of case we will now set out: Bolen, on December 23, 1893, being a householder and the head of a family, owned in fee simple one hundred and sixty acres of land, in a body, and of less value than two thousand dollars, and had his home upon it with his family. Besides, he owned an undivided one-half interest in eighty acres adjoining and an undivided ³⁴⁷ one-fifth interest in fifteen acres cornering on it, and a three-year lease of seventy-eight acres adjoining. So he then had, by lease, by undivided interests and in fee, three hundred and thirty-three acres of land, but was sole owner in fee of only one hundred and sixty acres, and on this he lived; and on that day (December 23, 1893) he conveyed by warranty deed twenty acres of this one hundred and sixty to Lilly and others, appellees, and this is the subject of this controversy. After this, and in 1895, Bolen removed from his old home, with his family, to the town of Pontotoc, where his wife, who had refused to join in the deed to Lilly and others, died in 1897. Since her death, Bolen, shortly before the expiration of the statutory bar by limitation, brought this action of ejectment for the twenty acres on the ground that the conveyance was void because of the nonjoinder of his wife.

Lilly and others' sole defense to the action is the deed of Bolen, and his partial interest in the adjacent lands, except that they seek to place this case in the category of *Wilson v. Gray*, 59 Miss. 525, in which the court held

(Cooper, J., dissenting) that a sale of the homestead by the owner, without the joinder of the wife, was valid if made "in order to effect" a change of his residence, pursuant to his previous resolve to make the change. It is needless now to inquire whether that decision, on the facts sought to be proved before the court then, should be applied to the testimony offered and admitted here. There evidence offered and refused to be admitted, and for which refusal there was a reversal, was to the effect that the vendor had used the money of the vendee to purchase a home in Texas, had determined to move there, made the sale for that very purpose, and soon after did move to the Texas home. Here there was simply an offer to prove by Lilly that Bolen told him he was going to move to Pontotoc. In fact, he did not go to Pontotoc until after a year and a half, or more, afterward, and, in fact, Lilly could not have depended on this, because he made ineffectual efforts to have Mrs. Bolen join in the conveyance. ³⁴⁸ But it is useless, as we have said, to contrast the two cases; and this is because there is conflict in the evidence, which a jury only could decide upon, and there was a peremptory instruction. Even Lilly is doubtful as to when Bolen made the statement, and Bolen testifies that he never made it, and that he never thought of moving to Pontotoc until the fall of 1895. If the mere statement of the vendor of a purpose to remove is conclusive, the statute is worthless.

Whatever may be thought or said of the ethics of this action, it is certainly true, as a matter of law, that a conveyance of the homestead, or any part of it, by the owner, without his wife's joinder, is invalid, a void act—goes for nothing—and ejectment lies by the vendor to recover it. That the land was part of the homestead in the case before us, and that it was so regarded by Bolen, by his wife, and by Lilly and others, seems plain from this record: *Hubbard v. Sage L. & Imp. Co.*, 81 Miss. 618, 33 South. 413.

There is no estoppel because the conveyance had a clause of warranty. This would nullify the statute. The whole conveyance is invalid: *Connor v. McMurray*, 2 Allen (Mass.), 202; *Doyle v. Coburn*, 6 Allen (Mass.), 72.

The land being part of the homestead, as understood by all concerned, we need not consider the lands adjoining, in which Bolen had a part interest or a leasehold; but it

would be hardly within the spirit and purpose of the statute to confine the homestead to these, when it was in fact located on the one hundred and sixty acres of sole ownership.

Reversed and remanded.

The Effect of a Conveyance of a Homestead by one only of the spouses is considered at length in the monographic note to *Jerde v. Furbush*, 95 Am. St. Rep. 939-944. As to whether such a conveyance can work an estoppel against the spouse executing it by covenants in the deed or otherwise, see pages 921, 922 of this note, and the subsequent case of *Adams v. Gilbert*, 67 Kan. 273, 100 Am. St. Rep. 456. It is generally held, that a conveyance of a homestead by only one spouse is void: See the note to *Jerde v. Furbush*, 95 Am. St. Rep. 911; *Roberson v. Tippie*, 209 Ill. 38, 101 Am. St. Rep. 217.

ILLINOIS CENTRAL RAILROAD COMPANY v. SMITH.

[85 Miss. 349, 37 South. 643.]

CARRIERS OF PASSENGERS are not Bound to Accept and carry without an attendant one who, because of physical or mental disability, is unable to take care of himself. (p. 295.)

CARRIERS OF PASSENGERS may Deny Transportation to any person who, on account of physical or mental disability, is unable to care for himself, or liable on account of that incapacity to become a burden upon fellow-passengers or to require extra attention from the carrier. (p. 295.)

CARRIERS—Passengers—Persons Under Incapacity—Duty to Carry.—Any person desiring transportation by a common carrier is entitled to passage upon payment of fare, notwithstanding his seeming mental or physical incapacity, if, as a matter of fact, he is competent to travel alone without requiring other care than that which the law requires the carrier to bestow upon all passengers alike. If this proof of capacity is in any manner brought to the knowledge of the agent of the carrier, the latter is liable in damages for any exclusion of such person from its trains. (pp. 295, 296.)

CARRIERS—Passengers—Blind Persons.—If a blind person applies to purchase a passenger ticket, being himself unknown to the ticket agent, and a ticket is refused, the carrier is not by this act alone, liable in damages, but if such agent knows of the ability of such blind person to travel alone, or if the fact of such ability is made known to him in any manner, and he then arbitrarily refuses to sell such person a ticket, the carrier becomes liable for both compensatory and punitive damages. (p. 296.)

CARRIERS—Passengers—Blind Person—Duty to Carry.—It is the duty of a ticket agent of a carrier of passengers to listen to the explanation made by a blind person desiring to purchase a ticket and judge of his competency to travel alone in the light of the facts then made known to him, and the question of the

reasonableness of his refusal to furnish such ticket is one of fact to be submitted to the jury, should litigation arise. (pp. 296, 297.)

CARRIERS—Passengers—Duty to Carry Blind Man—Damages for Refusal.—If the ticket agent of a railroad company refuses, wantonly and arbitrarily, to sell a passenger ticket to a blind man, knowing at the time that such person is a thoroughly competent traveler alone, the carrier is liable in punitive damages. (p. 298.)

Mayes & Longstreet and J. M. Dickinson, for the appellant.

Teat & Teat, for the appellee.

²⁵⁴ **TRULY, J** Appellee, a minor, eighteen years of age, desiring to travel from Winona to Durant, in this state, applied to the agent of appellant to purchase a ticket, tendering proper fare. This was refused him on the ground that he was blind and unaccompanied by an assistant, and, under an existing rule of the railroad company, was not entitled to transportation. Appellee claimed that he was an experienced traveler, able to care for himself and needing no assistance. He offered to produce his order book to show that he was in the habit of traveling and booking orders for goods, but the agent persisted in his refusal. Thereby appellee was forced to change his route and travel over another railway. He brought suit against appellant, claiming both actual and punitive damages. The actual damage proven was small. The jury awarded punitive damages under the instructions of the court, and the Illinois Central Railroad Company appealed.

Several instructions were granted appellee, embodying the same general idea. The first and fifth will sufficiently illustrate the main propositions presented for consideration. They are as follows:

“No. 1. The court instructs the jury that if they believe that the plaintiff, J. H. Smith, on the nineteenth day of January, 1903, applied to the defendant's ticket agent at Winona, Mississippi, at the proper time and place and in the proper manner, for the purchase of a railroad ticket from Winona, Mississippi, to Durant, Mississippi, then and there tendering the requisite amount of cash fare, as alleged in the plaintiff's declaration, and that said agent then and there refused to sell ²⁵⁵ plaintiff a ticket as requested for no other reason than that the plaintiff was blind, and that the plaintiff, although blind, was in fact

otherwise qualified to travel, the defendant is guilty of a wrong, and they should find for the plaintiff, and assess his damages at such sum as they may think proper from all the evidence, not exceeding the sum sued for—to wit, fifteen hundred dollars.

“No. 5. The court instructs the jury, for the plaintiff, that a common carrier of passengers cannot refuse to carry a person, otherwise qualified, upon the sole ground that he is blind; and if a common carrier willfully refuses so to do, it is liable for punitive damages.”

The general rule in force in this state is that which is embodied in the text and accurately stated in 5 American and English Encyclopedia of Law, page 538, note 4: “While persons who are ill have a right to enter and travel upon the conveyances of a common carrier of passengers, nevertheless the carrier is not bound to accept as a passenger, without an attendant, one who, because of physical or mental disability, is unable to take care of himself; but should the carrier voluntarily accept as a passenger such a person without an attendant, his inability to care for himself, rendering special care and assistance necessary, being apparent or made known at the time of his application for carriage to the servants of the carrier, the latter will be held responsible if such care and assistance are not afforded.” See, also, *Weightman v. Louisville etc. Ry. Co.*, 70 Miss. 563, 35 Am. St. Rep. 660, 12 South. 586, 19 L. R. A. 671; *Sevier v. Vicksburg & U. R. R.*, 61 Miss. 8, 48 Am. Rep. 74; *New Orleans etc. R. R. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478. This rule recognizes the authority of the carrier to exclude and deny transportation to any person desiring passage who, on account of physical or mental disability is unable to care for himself, or liable on account of that incapacity to become a burden upon his fellow-passengers or to require extra attention from the carrier. But inasmuch as experience has shown that many persons seemingly incapacitated by physical disability are in truth perfectly competent to ³⁵⁶ travel alone, the courts, in the interest of the traveling public, have modified the rigor and limited the otherwise universal application of the rule by providing that any person desiring transportation shall be entitled to passage upon payment of fare, notwithstanding his seeming incapacity, if, as a matter of fact, he be competent to travel alone without requiring

other care than that which the law requires the carrier to bestow upon all its passengers alike; and if this proof of capacity be in any manner brought to the knowledge of the agent of the carrier, the carrier is liable in damages for any exclusion from its trains. This is the evident meaning of the opinion of this court in the case of *Zachary v. Mobile etc. R. R.*, 75 Miss. 751, 65 Am. St. Rep. 617, 23 South. 434, 41 L. R. A. 385, where, through Whitfield, Justice, it is said: "Each case must depend on its own facts, and the reasonableness of the refusal to sell a blind person a ticket must on principle depend not on a universal, arbitrary, and indiscriminating rule like this one, but on the capacity to travel, unaccompanied, of the particular blind person, as shown by the proof on that point in his case." Primarily the affliction of blindness unfits every person for safe travel by railway, if unaccompanied. No blind person, without previous experience could possibly accommodate himself to the many exigencies incident to travel by railroad, or guard himself against peril in boarding and alighting from trains, changing from one train to another, or threading his way in safety across the railway tracks at crowded stations. Hence the rule which provides that every blind person is presumed to be, in the absence of proof of experience, unfit to travel alone, is not unreasonable. Nor do we consider such a regulation a hardship upon the persons afflicted with blindness or other disabling physical infirmity. It is rather a safeguard thrown around them for their own protection. Therefore, when a blind person applies to purchase a ticket, being himself unknown to the agent, and that ticket is refused, the carrier is not liable by this act alone to be mulcted in damages; but, as before ²⁵⁷ indicated, if the agent of the carrier knows of his personal knowledge of the competency to travel of the particular person, or if the fact of such ability is made known to him in any manner, and he still persists wantonly and arbitrarily in his refusal to sell the person desiring passage a ticket, the carrier may be made to respond in damages for his oppressive act. And it is the duty of the agent of the carrier to listen to the explanation made by the person desiring to purchase a ticket, and judge of his competency in the light of the facts then made known to him, and the question of the reasonableness or unreasonableness of his refusal is one of fact to

be submitted to the jury, should litigation arise; and if it should appear that such refusal was reasonable under the circumstances, as they then existed to the knowledge of the agent, the carrier would not be liable to damages; but, as in every other case, if it should develop that his action was caused by wantonness or a desire to arbitrarily injure, humiliate, or oppress the proposed passenger by such action, the carrier would be responsible, and would be liable both to compensatory and punitive damages. In the instant case it will be observed that the first instruction set out above told the jury that if they believed the agent refused to sell plaintiff a ticket on the sole ground that he was blind, and that if they further believed that the plaintiff, "although blind, was in fact otherwise qualified to travel," then, these two facts being established, the railroad was convicted of a wrong, and the jury was authorized to find for plaintiff, and to assess his damages "at such sum as they may think proper from all the evidence, not exceeding the sum sued for." An inspection of the record shows that there was no dispute as to the fact that the agent's refusal to sell appellee a ticket was "for no other reason than that the plaintiff was blind"; so the first instruction in effect directed the jury to inflict such damages as they thought proper, from the evidence, upon the railroad company, if they, the jury, believed that the plaintiff, although blind, "was otherwise qualified to travel."

358 The fifth instruction was to the effect that if a common carrier willfully refused to carry a person otherwise qualified on the sole ground that he is blind, it was "liable for punitive damages." Both instructions are erroneous for want of the same limitation—i. e., that the agent of the railroad knew, or had reasonable grounds to believe, or from circumstances within his knowledge ought to have known, that the person demanding transportation, although blind, was otherwise qualified to travel. The infliction of punitive damages is authorized where an employé of a carrier knowingly and wantonly refuses to do some act which his duty requires that he shall perform, and is not properly predicable of a fact unless proof of its existence is brought to the knowledge of the acting party. In this case, under the general rule hereinbefore announced, when the appellee demanded the right to purchase a ticket and

become a passenger, while unattended by an assistant, the agent was acting within the scope of a reasonable regulation, designed for the protection of all persons suffering from disabling physical infirmities, when he refused to sell the ticket, and the fact, if fact it was, that appellee was in truth qualified to travel alone, unless brought to the knowledge of the agent, placed no additional liability upon the appellant. No matter how thoroughly competent appellee may have been to travel unattended or how extensive his traveling experience, unless the agent either knew, or from circumstances of which he had notice ought to have known, of this competency and previous experience, the mere existence of these facts could not in any way impute wrongfulness to an act committed in ignorance of them. If the agent of a railroad company refuses wantonly and arbitrarily to sell a ticket to a blind man, knowing at the time that such person is a thoroughly competent traveler, then the carrier would be liable to punitive damages, and the mere fact of blindness, and the apparent existence of a disability which the agent knew was only apparent and not actual, would not excuse or justify the oppressive act. But the two instructions under ³⁵⁰ review ignore this vital element, and authorize the jury to inflict punitive damages upon the appellant for the commission of an act by its employé when, so far as the instructions show, the employé may not have known of the existence of the very fact which rendered his action in refusing the ticket wrong, if wrong it was.

As the case must be remanded for a new trial, we refrain from any comment upon the testimony as to whether the evidence proved that the appellee was competent to travel alone or whether the facts made known to the agent of the appellant were such as should have led him to infer such competency on the part of appellee.

Reversed, and remanded for a new trial.

WHAT PERSONS CARRIER MAY REFUSE TO TRANSPORT.

- I. Generally, 299.
- II. Drunken Person, 299.
- III. Bad Character or Habits, 300.
- IV. Blind Persons, 301.
- V. Sick or Infirm Persons, 302.
- VI. Insane Persons, 302.

VII. Persons Interfering With Business Interests, 302.

VIII. Persons With Contagious Disease, 303.

IX. Person Banished, 303.

I. Generally.

A common carrier of passengers is not bound at all times to carry all persons who present themselves for transportation. As we shall show hereafter there are many conditions, and circumstances which justify the carrier in refusing to carry one who presents himself for transportation. Perhaps the best general rule that can be laid down is, that a common carrier of passengers is bound to receive all who require a passage, so long as the carrier has room, and no legal excuse for a refusal, and that what will constitute such refusal must depend, to a great extent, upon the circumstances of each particular case: *Bennett v. Dutton*, 10 N. H. 481; *Pearsen v. Duane*, 4 Wall. 605, 18 L. ed. 447. It may be the duty of a common carrier of passengers to carry under discriminating restrictions, or to refuse to carry, those who by reason of their physical or mental condition, would injure, endanger, disturb, or annoy other passengers; *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430, 13 Am. Rep. 72. The right of passengers to a passage by common carrier is not an unlimited right. The carrier, however, is bound as such to receive all persons on board, to whose character and conduct there is no reasonable objection, if there are suitable accommodations, but he may rightfully exclude all persons of bad character or habits. In fact, he may lawfully refuse to carry all whose objects are in any way to interfere with his interests, or to disturb his hire of patronage, or who refuse to obey his reasonable regulations made for the government of his business, and he may rightfully inquire into the habits or motives of passengers who offer themselves for transportation: *Jencks v. Coleman*, 2 Sim. 221. "A railway company is bound, as a common carrier, where not overcrowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line, one fleeing from justice, one going upon the train to assault a passenger, commit larceny, or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime, nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. The person must be upon lawful and legitimate business": *Thurston v. Union Pac. R. R. Co.*, 4 Dill. 321.

II. Drunken Person.

It may be stated as a general rule that a common carrier of passengers may lawfully refuse to carry a person who is drunk, and this

is essentially true of a person who, without an attendant and from intoxication, is mentally or physically incapable of taking care of himself: *Price v. St. Louis etc. Ry. Co. (Ark.)*, 88 S. W. 575. A street railway may refuse to carry a person who, by reason of his intoxication or otherwise, is in such a condition as to render it reasonably certain that by act or speech, he will become offensive or annoying to other passengers therein, although he has not committed any act of offense or annoyance: *Vinton v. Middlesex R. R. Co.*, 11 Allen, 304, 87 Am. Dec. 714; *Murphy v. Union Ry. Co.*, 118 Mass. 228. Drunken men should not be permitted to ride on railroad cars or, if so, should be so guarded or separated from the orderly part of the passengers as to prevent injury from them: *Pittsburg etc. R. R. Co. v. Pillow*, 76 Pa. St. 510, 18 Am. Rep. 424. Thus, a railroad company may lawfully require passengers to exhibit their tickets before entering the cars, and may refuse to receive any person as a passenger, although he exhibits a ticket, who is drunk to such a degree as to be disgusting, offensive, disagreeable, or annoying, and likely to violate the common proprieties, decencies, and civilities of life: *Pittsburgh etc. Ry. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68. And a railroad company has a legal right to refuse to allow a person who has no ticket, and who is so far intoxicated as to be helpless and almost unconscious, to enter its passenger car: *Freedon v. New York Cent. etc. R. R. Co.*, 24 N. Y. App. Div. 306, 48 N. Y. Supp. 584. It has been held, however, that slight intoxication, such as would not be likely to seriously affect the conduct of the person intoxicated is not sufficient ground to refuse him passage in a public car, although his behavior might not be in all respects strictly becoming: *Pittsburgh etc. Ry. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68. It has also been held that the fact that a person has drunk to excess will not in every case warrant a refusal to carry him; it is rather the effect upon him, and the fact that by reason of the intoxication he is dangerous or annoying to others, that gives the right to refuse to carry him as a passenger: *Putnam v. Broadway etc. R. I. Co.*, 55 N. Y. 108, 14 Am. Rep. 190; *Milliman v. New York Cent. etc. R. R. Co.*, 66 N. Y. 642.

III. Bad Character or Habits.

A common carrier of passengers may rightfully refuse to carry all persons whose character or habits are likely to prove offensive or dangerous to its other patrons: *Jencks v. Coleman*, 2 Sim. 221. Gamblers and monte men whose purpose in traveling upon a train is to ply their vocation, may lawfully be refused passage, and necessary force may be used to prevent them from entering trains: *Thurston v. Union Pac. R. R. Co.*, 4 Dill. 321. A woman who has been guilty of vulgar conduct and indecent language in the presence of other passengers on former occasions, and who refuses to deport herself with-

and lawfully refused transportation: *Stevenson v. West Seattle Land & Imp. Co.*, 22 Wash. 84, 60 Pac. 51. A carrier of passengers may rightfully refuse to carry or accept a passenger whose conduct at the time is annoying, or whose reputation for misbehavior is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive to other passengers, but the social penalty of exclusion of unchaste women from hotels, theaters, and other public places cannot be imported into the law of common carriers, nor can the carrier classify his passengers according to their respective reputations for chastity, whether they be men or women: *Brown v. Memphis etc. R. R. Co.*, 5 Fed. 499, 7 Fed. 51.

IV. Blind Persons.

The decided cases establish the rule that a common carrier of passengers cannot refuse to carry a person otherwise qualified upon the sole ground that he is blind and not attended by any assistant: *Zachery v. Mobile etc. R. Co.*, 72 Miss. 520, 60 Am. St. Rep. 529, 21 South. 246, 36 L. R. A. 546; 75 Miss. 746, 67 Am. St. Rep. 617, 23 South. 434, 41 L. R. A. 385. In the latter case the court said: "We are asked to hold that a regulation that no blind person whatever shall travel unaccompanied by an assistant, no matter how skillful or expert a traveler he may have been, or may be, and no matter how perfectly qualified in every other respect to travel on cars unaccompanied, is a reasonable rule. This cannot be sound. Each case must depend upon its own facts, and the reasonableness of the refusal to sell the blind person a ticket must, on principle, depend, not on a universal, arbitrary, and indiscriminating rule like this one, but on the capacity to travel unaccompanied of the particular blind person, as shown by the proof on that point in his case." The principal case undoubtedly modifies the former Mississippi rule very materially, and reference is herewith made to the language used therein. The latter case (*Illinois Cent. R. R. Co. v. Smith*, 85 Miss. 349, ante, p. 293, 37 South. 643, 70 L. R. A. 642), is approved in *Illinois Cent. R. R. Co. v. Allen (Ky.)*, 89 S. W. 150, 28 Ky. Law Rep. 198, where it is held that if a very old and totally blind man applies to a ticket agent for a ticket for a railway journey necessitating the changing of cars two or three times, and it appears that he has frequently taken short trips involving no change of cars, and that on such trips some one would have to assist him in getting on or off of the train; and that on taking a trip involving a change of cars, he must depend on the assistance of chance acquaintances or of the employees of the train to make such changes, the carrier is justified in refusing to sell him a ticket unless he secures an attendant.

V. Sick or Infirm Persons.

Several cases lay down the rule that the right of passenger carriage is not confined to persons who are physically sound, but is open, to a reasonable degree, to those ailing and infirm; and that while the cars of a railroad company are not hospitals nor their employes nurses, yet persons who are aged, or ill or infirm, have a right to enter the cars of a railroad company and travel therein, and as a common carrier of passengers, the company has no right to prevent them, but the increased risk arising from conditions affecting their fitness on journey, certainly when they are unknown to the carrier, must rest upon their own shoulders; and such disabled persons must provide themselves with proper assistance while traveling, or assume all extraordinary risks: *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 428; *Pullman Palace Car Co. v. Barker*, 4 Colo. 844, 34 Am. Rep. 89; *Mathew v. Wabash R. R. Co.* (Mo. App.), 78 S. W. 271. The more satisfactory rule is that maintained in *Croom v. Chicago etc. Ry. Co.*, 52 Minn. 296, 38 Am. St. Rep. 557, 53 N. W. 1128, 18 L. R. A. 602, to the effect that a railroad company is not bound to receive on its cars as a passenger a person who because of extreme old age or extreme youth, or sickness, or any physical or mental infirmity, is unable to take care of himself, unless he has an attendant with him.

VI. Insane Persons.

Common carriers, it seems, cannot absolutely refuse to transport persons who are insane, but may, in all cases, insist that they be properly attended, safely guarded, and securely restrained, and when it becomes necessary to transport a lunatic, who by reason of his violence may endanger the safety or interfere with the comfort, or other travelers, the carrier is entitled to seasonable notice in order that it may make proper arrangements for his transportation: *Owens v. Macon etc. Ry. Co.*, 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946. And a common carrier is not bound to receive as a passenger a person who offers to pay proper fare, and at the time is apparently harmless, if the carrier in fact knows that he is insane and not under restraint, and has grounds for suspicion that he may, by reason of his insanity, be dangerous to others upon the carrier's vehicle: *Meyer v. St. Louis etc. Ry. Co.*, 54 Fed. 116, 4 C. C. A. 221.

VII. Persons Interfering With Business Interests.

A common carrier of passengers may rightfully refuse to accept as passengers all persons whose object is in any way to interfere with the business interests of the carrier: *Jencks v. Coleman*, 2 Sim. 221; *The D. R. Martin*, 11 Blatchf. 233; *Thurston v. Union Pac. R. R. Co.*, 4 Dill. 321. And the carrier may waive his rights in this respect as to one person and enforce them in respect to another person, and

the sale or leasing by the carrier of the right to transact on his vehicle such business as may be done thereon in a certain vocation, to the exclusion of others therefrom, is a reasonable regulation: *The D. R. Martin*, 11 Blatchf. 233. A common carrier of passengers may establish on his car or vessel or other means of transportation an agency for the delivery of passengers' baggage, and may exclude and refuse to accept as passengers all other persons who may desire transportation for the purpose of soliciting or receiving orders from other passengers in competition with such agency: *Barney v. Oyster Bay etc. Co.*, 67 N. Y. 301, 23 Am. Rep. 115.

VIII. Persons with Contagious Disease.

A carrier of passengers is not under any obligation to carry persons infected with a contagious disease, to the danger of other passengers: *Thurston v. Union Pacific R. R. Co.*, 4 Dill 321.

IX. Person Banished.

A common carrier of passengers by sea may properly refuse to accept as a passenger a person who has been forcibly banished and expelled by the actual, though violent and revolutionary, authorities of a place, under threat of death if he return, when the bringing back and landing of such person by the carrier would in his judgment tend to promote further trouble and difficulty: *Pearson v. Duane*, 4 Wall. 605, 18 L. ed. 447.

ROSAMAN v. OKOLONA.

[85 Miss. 583, 37 South. 641.]

TRAVELERS—Carrying Concealed Weapons.—A person, who comes into a town for a stay of indefinite duration, cannot set up as a defense to a proceeding against him for carrying concealed weapons, that he is a traveler. His rights as such terminate when he reaches the town and decides to stay therein for an indefinite time. (p. 304.)

A. T. Stovall, for the appellant.

L. P. Haley, for the appellee.

585 **CALHOON, J.** The city of Okolona had, as it legally might have, an ordinance denouncing a penalty against carrying concealed weapons, and under it Mr. Rosaman was convicted. It is immaterial to determine whether the court erred in permitting the prosecution to ask accused, as a witness, whether he had not pleaded guilty in the mayor's court, be-

cause his own testimony in the circuit court clearly establishes his guilt. According to his testimony, he was a nonresident of this state, and came to Okolona for the purpose of employing hands for a railroad company. He arrived in Okolona on Friday evening, with a pistol on his person, took board and lodging at a hotel, and carried the pistol on his person the next day, Saturday, until noon, when he put it under his bedclothing. On Sunday morning officers came to arrest him for enticing away laborers, and he then put the pistol on his person and went with them to the jail. The defense of being a traveler to defeat this prosecution cannot avail the appellant in this case. He had the right to carry his pistol to Okolona, which was his point of destination, and might be regarded as a traveler until he reached his room. But, in our opinion, he was not a traveler during the forenoon of Saturday, when he did carry the pistol on his person. His stay in Okolona was of uncertain duration; and if he had the right to carry the concealed weapon, so may every man on a journey carry one in any city or town for an indefinite period, until he shall have finished his business at the place, even though it should require weeks or months: *McGuirk v. State*, 64 Miss. 212, 1 South. 103; *Wilson v. State*, 81 Miss. 404, 33 South. 171.

Affirmed.

For a Decision in support of the principal case see *Carr v. State*, 34 Ark. 448, 36 Am. Rep. 15. One may be guilty of carrying concealed weapons, it has been held, while alone in his own home: *Dunston v. State*, 124 Ala. 89, 82 Am. St. Rep. 152.

HINDS COUNTY v. NATCHEZ, JACKSON AND COLUMBUS RAILROAD COMPANY.

[85 Miss. 599, 38 South. 189.]

CORPORATIONS—Sale of Franchise.—Stockholders in a corporation which sells its franchise cannot attack the sale for want of power in the purchaser to buy. (p. 310.)

CORPORATIONS—Sale of Franchise.—Whatever complaint may be made, by creditors of a corporation which sells its franchise, or by stockholders of the purchaser, or by the state, of want of power in the purchaser to buy, this objection cannot be made by the selling corporation or its stockholders. (p. 310.)

CORPORATIONS—Sale of Franchise and Property by Majority of Stockholders.—A private corporation, doing a losing and unprofitable business, may sell its franchise and entire assets upon a vote of a majority of the stockholders, without the consent of the minority. (p. 310.)

CORPORATIONS—Sale of Stock—Estoppel of Stockholder to Attack.—If a county owns a majority of the stock of a railroad and controls its management for a long period of years, being represented by its agent at every stockholders' meeting, and participating through such agent, in the issuance and sale of stock, it is estopped to question the validity of the stock so issued and sold, in the hands of the purchaser or holder thereof. (p. 311.)

CORPORATIONS—Meetings.—Individual Stockholders are bound by the action or the majority at corporate meetings of which due notice is given, although such individual stockholders are not represented at such meetings. (p. 311.)

CORPORATIONS.—Counties Which Issue Bonds for Railroad Stock do not hold and own the stock given therefor, in a governmental capacity, but hold it in the same way, and subject to the same rights and obligations, as private corporations or individuals. (p. 312.)

CORPORATIONS—Sale of Franchise—Estoppel of Stockholder to Attack.—A county which issues bonds to, and holds stock in a railroad and which appoints a representative to act as director in the railroad corporation is bound by his action at a directors' meeting, in participating in the sale of the corporate franchise and assets, and it is estopped to attack or repudiate such sale. (p. 312.)

Green & Green, Williamson & Wells and E. E. Brown, for the appellants.

Mayes & Longstreet and McWillie & Thompson, for the appellees.

⁶²⁴ ALEXANDER, S. J. This is a suit brought by the counties of Hinds and Adams, as stockholders of the Natchez, Jackson & Columbus Railroad Company, to cancel, as fraudulent in fact and unauthorized in law, the sale by that company of its railroad property and franchises to the Louis-

ville, New Orleans & Texas Railroad Company, and for other incidental relief. The sale was made pursuant to an act of the legislature approved February 19, 1890 (Laws 1890, p. 675, c. 502), entitled "An act to authorize the Natchez, Jackson & Columbus Railroad Company to sell its railroad situated in this state, or to consolidate the same." Section 1 of the act authorized the company to sell absolutely all or any part of its railroad, including its franchises. Section 2 empowered the Louisville, New Orleans & Texas Railway Company to consolidate with the Natchez, Jackson & Columbus Railroad Company on such terms as might be agreed on by them.

The record contains a complete history of the Natchez, Jackson & Columbus Railroad Company, in its minutest details, from its incorporation and organization. After a careful examination of all the evidence relied on by plaintiffs as establishing fraud, we concur with the chancellor in his finding: that there was no actual fraud either on the part of the buying or selling corporation, in the sale itself or in any of the dealings culminating in the sale. Nor do we find any actual fraud in the issuance, hypothecation, or sale of capital stock. On the contrary, we think that the history of the Natchez, Jackson & Columbus Railroad Company presents a record singularly free from any suspicion of misconduct, and characterized by scrupulous regard for stockholders and fidelity and fairness to creditors. At the time the company was chartered, in 1870, it could hardly have been considered a promising business venture by ⁶²⁵ those conversant with the then conditions in this state. Projected without any capital stock or financial backing, and dependent for its construction almost wholly upon county aid, its natal and normal condition was insolvency. That the task of its construction was undertaken at all was due mainly to the indomitable zeal and energy of its chief promoter and for many years its president, General W. T. Martin. Undaunted by difficulties, he successfully encountered all the vexations and grappled with all the problems that arose during the ten years of construction, and, we might add, without receiving the emoluments which are usually thought to be consequent upon the position of a railroad president. The company was chartered in 1870, and the first subscription to its capital stock was made in the following year by Adams county, which voted to subscribe for \$600,000 of the stock and issue its bonds to pay therefor.

The legality of this subscription was afterward questioned, and by a compromise settlement it was reduced one-half. The corporation was then permanently organized; and as only a comparatively trifling amount of stock was then or at any time afterward subscribed by individuals, Adams county had practically exclusive control of the enterprise. With the money obtained by discounting these county bonds and with funds borrowed on its own obligations and mortgages at ruinous rates of interest, the railroad crept along from Natchez to Jackson, building by piecemeal, and so slowly that the equipment of sections first built was old and worn out before the road was completed, and the interest on its indebtedness amounted to almost as much as the cost of the road.

In 1880 the city of Natchez was induced to vote a subscription of \$225,000 to the capital stock, conditioned on the guaranty of the railroad to pay the interest and principal on the city's bonds as they matured, and thus prevent any levy of taxes to pay them. This subscription is assailed by complainants as ultra vires, and the guaranty of the railroad company and the ⁶²⁶ issuance of the mortgage bonds to secure such guaranty are attacked as beyond the power of the corporation.

Before the railroad was completed to the Hinds county line, the county of Hinds voted a subscription of \$200,000 to the capital stock of the company, but to be used only in payment for the construction of the road within the county. Thus the bonds of the county to pay for the subscription did not become available until 1882. Meanwhile the stock of the company was greatly embarrassed, and, having no credit, it procured certain of its directors in Natchez to lend their credit to the company by executing their accommodation notes, aggregating \$150,000, to be used by the company as collateral security. These notes were obtained on a nominal sale of stock to the amount of \$1,500,000, being on the basis of ten cents on the dollar, and issued subject to the right of the company to repurchase it within some short fixed period at a slightly advanced price. By the hypothecation of these accommodation notes and of this stock and by pledging the undelivered Hinds county bonds, the needed loan was secured. In connection with the issuance, sale, and hypothecation of the stock and bonds of the company, it is well to note that the charter of the railroad company authorized it to borrow money upon its own credit for the purpose of constructing and maintaining the railroad, and to issue its corporate bonds

or promissory notes, and to mortgage its railroad and franchises, and to sell, dispose of, or negotiate its bonds and corporate stock at such prices as, in the judgment of the company, evidenced by the voice of two-thirds of the directors, would best advance its interests, and if such bonds, notes, or stock should be sold at discount, the sale should nevertheless be valid for the par value thereof.

In January, 1883, matters being in the general condition above described, the company, through its president, and pursuant to an order of its directors, entered into a contract with Joseph W. Drexel, by which, in consideration of the company's obligation to pay \$304,000 in twelve months, and a transfer and ⁶²⁷ delivery to Drexel of thirty thousand shares (\$1,500,000) of stock of the company and \$1,250,000 of bonds, secured by second mortgage on the railroad, Drexel turned over to the company certain bonds of the New York, West Shore and Buffalo Railroad Company, of the face value of \$320,000, which could be sold and were sold by General Martin, but at a discount of more than twenty per cent. The agreement with Drexel further stipulated that, upon default in the payment of the company's obligation, all of the stock and bonds hypothecated should become the absolute property of Drexel, upon the further condition that he should pay off all the outstanding mortgages of the railroad company, estimated to be about \$425,000. This transaction is characterized by complainants as a loan, and is assailed by them as usurious, and also illegal, on the ground that it was voted by the directors to provide a mode of payment of the debt secured in part by their own accommodation notes aforesaid and to pay the debt of the company growing out of its guaranty of the city of Natchez bonds. The note or obligation of Drexel was extended from year to year, but meanwhile the city of Natchez was being pressed and importuned by the holders of its bonds; and the railroad company obtained another loan on short credit from Morris K. Jesup, trustee for Drexel, to pay off the bonds of the city of Natchez. These were paid, and the mortgage bonds which had been pledged to secure performance of the company's guaranty in favor of the city were transferred, to be held as collateral for Drexel. Thus Drexel, through his trustee, held practically all of the stock of the company, except that owned by the counties of Adams and Hinds; and the right of the company to redeem, under its contract, having been lost by default, Drexel claimed

the absolute ownership of the stock and bonds. Thereupon the directors, on May 6, 1887, waived the right to redeem, and by a formal order directed the reissuance and delivery of the said amount of stock to such persons as might be indicated by Jesup, which was done. The latter, then, in execution of his part of the contract, procured a surrender to ⁶²⁸ the company of all the outstanding mortgage notes and bonds which he had conditionally assumed to pay. Thus Drexel and Jesup and their appointees came into the ownership and possession of a controlling interest in the Natchez, Jackson and Columbus Railroad Company, and at the succeeding annual meeting, in January, 1888, dictated the selection of the directory. At the same meeting T. J. Nichol became president of the company instead of General Martin.

In March, 1889, the Drexel and Jesup stock and bonds were sold to the Financial Improvement Company, a construction company organized and controlled by the shareholders of the Louisville, New Orleans and Texas Railroad Company; and the control of the railroad company thus passed to those identified in interest, if not in name, with the company. On February 19, 1890, on the procurement of the officers of the Louisville, New Orleans and Texas Railroad Company, the act of 1890 (Laws 1890, p. 675, c. 502) was passed, authorizing the sale of the Natchez, Jackson and Columbus Railroad, or its consolidation with the Louisville, New Orleans and Texas Railway Company. Soon after the passage of the act the directors of the Natchez, Jackson and Columbus Railroad Company met, and, by the unanimous vote of the directors who were present, accepted the provisions of the act, and made a sale of the railroad and other property and the franchises of the company to the Louisville, New Orleans and Texas Railway Company, and directed the necessary conveyance to be executed. The directors also called a meeting of the stockholders to consider the matter of ratification of the sale, and at the meeting of the stockholders thus called the action of the directors was ratified. There was only one stockholder—the owner of fifty-four shares—who voted in the negative. The deed was thereupon executed, and the Louisville, New Orleans and Texas Railway Company (now, by consolidation, the Yazoo and Mississippi Valley Railroad Company) took exclusive control of the railroad and other property of the Natchez, Jackson and Columbus Railroad Company.

⁶²⁹ We have given a mere outline of the history of the railroad, stating only so much as we think necessary to a proper understanding of the legal principles which must be decisive of the controversy.

The first ground of attack on the sale is that, while the act of 1890 gave the Natchez, Jackson and Columbus Railroad Company authority to sell, the Louisville, New Orleans and Texas Railway Company had no authority under the act or under its own charter to buy. It is sufficient as to this to say that whatever complaint might be made by creditors of the selling corporation or stockholders of the purchasing company or by the state in its sovereign capacity, this objection cannot be made by the selling company or its stockholders: *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. Rep. 93, 33 L. ed. 317; *Union Nat. Bank v. Mathews*, 98 U. S. 621, 25 L. ed. 188; *Ohio etc. R. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693. See, also, *Quitman County v. Stritze*, 70 Miss. 320, 13 South. 36.

The next objection is that the act of 1890 was an amendment of the charter of the Natchez, Jackson and Columbus Railroad Company, and being fundamental in its nature, it could not be operative until accepted by all of the stockholders. We are aware of the rule announced by many courts that, even although the right is reserved in the state to repeal, alter, or amend the charter, an amendment which fundamentally changes the nature of a corporation cannot be imposed upon it if any of the stockholders dissent. This rule, if correct, has no application in this case. Even in the absence of express statutory power, a private corporation doing a losing and unprofitable business may sell its entire assets upon a vote of a majority of the stockholders: *Berry v. Broach*, 65 Miss. 450, 4 South. 117, citing *Morawetz on Private Corporations*, sec. 413; *Wood's Field on Corporations*, sec. 445; *Cook on Stock and Stockholders*, sec. 668. It is true that a railroad corporation has quasi public functions, but where the state, by a valid statute, has assented to the sale,⁶³⁰ as in this case, all difficulty on this account is removed. Whatever interest the public might have in the continued ownership and operation of the road by the corporation, this interest was certainly committed to the control of the legislature: *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490; *Black v. Delaware Canal Co.*, 22 N. J. Eq. 130.

It is not denied that the sale was approved by a majority of the stockholders present and voting, but the point is made that the stock held and voted by the Financial Improvement Company and its appointees was illegally issued and wrongfully acquired by Drexel and Jesup and their assignees, and could not be lawfully voted. There does not seem to have been any concealment from stockholders or the public of any of the facts or circumstances connected with the issuance, hypothecation, or sale of this stock. Whatever right other stockholders might have had to question the validity of this stock, the county of Adams cannot be heard to complain. By virtue of its ownership of a majority of the stock, it had virtual control of the company from its organization in 1871 until 1882; and after that, until 1887, the counties of Adams and Hinds together controlled the company. At every meeting of stockholders from 1872 to 1889, Adams county was represented by the president of its board of supervisors, and all the acts of its officers and directors were reported to and ratified by the stockholders. The county of Adams, by the president of its board of supervisors, participated in the issuance of this stock; and it was by its consent, if not by its active procurement, that the stock was placed with Drexel and Jesup. Consequently the county cannot object that the owners exercised the right incident to ownership of voting the stock at the stockholders' meetings. It thus becomes unnecessary to decide whether the appointment of General Martin to represent Adams county stock was invalid because not entered on the minutes of the board of supervisors. Due notice of the meeting was given; and even if Adams county was not represented, ⁶³¹ it was bound by the action of the majority of the stockholders.

The case in favor of Hinds county seems to be in no better attitude. After its acquisition of the stock, it was represented at nearly all of the meetings of the directors and stockholders. It is true that the persons assuming to act for it as stockholders were in many instances not appointed by the order of the board entered on its minutes. But, as stated above, we do not think it necessary to decide whether their appointment to vote the stock of the county had to be evidenced of record, for the county was accorded the right to elect one or more persons to represent it on the directory of the company, and during the whole time of its ownership it was so represented on the directory by persons appointed for

the purpose by formal orders entered on its minutes. One of the conditions of the subscription to the stock by Hinds county, as appears from the minutes of the board of supervisors, was that the county should be secured representation on the board of directors of the company. The county appointed men for the very purpose of acting as directors, and they were invited by the company to act, and did act, as such, and by their votes and their acquiescence, authorized and ratified the very transactions as to the loans and the issuance and disposition of the stock now the subject of complaint. The resolution in the directors' meeting on March 28, 1890, accepting the act of 1890 and directing the sale of the railroad, was introduced by H. C. Roberts, who was acting as a director in the company by the appointment of the board of supervisors of Hinds county, regularly entered on its minutes; and as if to remove all doubt as to his power under the charter to act for the county and serve as a director, it had caused a nominal amount of its stock to be transferred to him. In determining how far the county of Hinds was bound by the acts of Roberts, it must be borne in mind that the counties did not own and hold their stock in a governmental capacity. This we held in *Adams v. Natchez etc. R. R. Co.*, 76 Miss. 714, 25 South. 667. It follows necessarily ⁶³² from the views announced in that case that the county of Hinds held the stock in the same way and subject to the same rights and obligations as purely private corporations or individuals. Incident to this right as owner was the right to appoint such agents to represent its interests as the nature of the property or the business required. The legislature, in providing, as it did in section 20 of the charter of the railroad company, that the board of supervisors might appoint any person it saw fit to vote its stock, was merely declaring a right which the county would possess in the absence of a statute—a right incident to its ownership of the stock. It is immaterial by what name the agent was called, if in fact he was duly appointed to represent the county, and did in fact represent it. The fact that in his appointment, on the minutes of the board, he was called a "director," and was accorded and exercised all the functions of a director, sufficiently indicates the scope of his authority. Surely the agent of a private corporation, so appointed and so acting, would bind his principal. So we must hold the county of Hinds bound by the acts of Roberts: *Berry v. Broach*, 65 Miss. 450, 4 South. 117.

The cause of appellants has not lacked for ability and zeal of counsel. The transcripts and briefs are exceedingly voluminous, and we have not undertaken to discuss seriatim or in detail all of the points presented, many of which are correct as abstract legal propositions. All the material questions presented are determinable in the light of the principles above announced.

The decree of the chancery court is affirmed.

The Sale by a Corporation of all its property or assets is discussed at length in the monographic note to *Tanner v. Lindell Ry. Co.*, 103 Am. St. Rep. 548-572. The consolidation of corporations is considered in the extended note to *Morrison v. American Snuff Co.*, 89 Am. St. Rep. 604-656.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

CONNER v. CITY OF NEVADA.

[188 Mo. 148, 86 S. W. 256.]

MUNICIPAL CORPORATIONS.—Constitutional Limitations of Amount of Indebtedness Apply Only to Liabilities Ex Contractu. Hence, one injured in the public streets of a city through its negligence may recover damages therefor, notwithstanding the provisions of the constitution of the state limiting the rate of taxes that may be levied, providing the amount of indebtedness which the city may incur, and forbidding the incurring in one year of indebtedness to an extent in the aggregate beyond the revenue to be derived from the taxes of that year. (pp. 316, 318.)

MUNICIPAL CORPORATIONS—Public Street, What Deemed to be.—If it appears that a street has for years been used by the public as such, and graded, ditched, and sidewalked under the immediate supervision of the city street commissioner, and that the city has by ordinance granted a railway company authority to lay switch tracks and to construct a culvert therein, it will be deemed a public street of such city, though no ordinance can be shown directing the commissioner to do the work. (p. 322.)

PUBLIC OFFICERS—Proof of Who are and of Official Acts of.—Evidence of witnesses that they at the several dates named by them were street commissioners, and did work on a street in that capacity, is sufficient to show that they were such officers, and that such acts were official. (p. 322.)

NEGLIGENCE, Contributory, in Walking in the Dark in a Public Street.—A woman cannot be judged guilty of contributory negligence as a matter of law because, being unable to find any vehicle in which to ride from a railway depot, she walked in the dark along a public street carrying an infant in her arms and holding another **by the hand, trusting that the city had done its duty by keeping the streets in a reasonably safe condition.** (p. 322.)

NEGLIGENCE, Subsequent and Additional Injury Due to.—If a person is injured through a defect in a public street and is entitled to recover from the city therefor, he must use reasonable care to promote his recovery; but if a subsequent accident occurs in which he is guilty of no negligence, whereby the result of the in-

jury is made more severe, this result becomes a result of the first accident and does not diminish the right to recover therefor. (p. 323.)

DAMAGES, When not Excessive.—A verdict for three thousand dollars where, through the negligence of the defendant, the large bone in the plaintiff's leg was broken and she was rendered bedridden for ten months and up to the date of the trial, and was then still suffering, and where expert evidence shows that her injury will always give her trouble, is not excessive. (pp. 323, 324.)

J. B. Johnson and A. J. King, for the appellant.

Scott & Bowker, for the respondent.

¹⁵² VALLIANT, J. The substance of the plaintiff's petition is that, on the night of July 17, 1901, while she was walking along one of the public streets of the defendant city exercising ordinary care, she fell into a hole that defendant had negligently allowed to be in the street, and received severe personal injuries. The answer was a general denial and a plea of contributory negligence. The trial resulted in a verdict and judgment for the plaintiff for three thousand dollars, from which defendant appealed.

I. The first point presented in the brief of appellant is that under the terms of sections 11 and 12 of article 10 of the constitution, the defendant, a city of the third class, is not liable in this kind of an action. The proposition is that section 11 puts a limit on the rate of taxes that may be levied in such cities for city purposes, and section 12 puts a limit on the amount of indebtedness which the city may incur, forbidding the incurring in one year indebtedness to an extent in the aggregate beyond the revenue to be derived from the taxes of that year. The argument is that the tax rate was limited to produce only sufficient revenue to meet the necessary expenses of the city, and the incurring of all liability beyond that was forbidden, and that this, by necessary implication, makes it unlawful for the city to incur liability for its acts of negligence, because liability of that kind is indefinite and in a sense unlimited.

Appellant concedes that in numerous cases that have come before the courts of this state since cities have been limited by the constitution in their power to incur indebtedness, they have been held liable in damages ¹⁵³ when they have wrought injury by neglect of duty, but insists that the courts in so holding have passed in silence over the point now raised and that it has not been decided.

The clause of the constitution in question deals with the subject of incurring indebtedness which arises ex contractu and which is very different in its nature from suffering liability for a tort. The language of section 12 is that the city shall not be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose. This language shows that it is indebtedness incurred by assent, agreement or contract. The word "debt" has a well-recognized meaning in law distinguished from liability for damages. After a claim for damages is reduced to a judgment it becomes in a technical sense, a debt, but it is a debt imposed by law, not one assumed by contract. What our constitution aims to control is the action of the municipal corporation in the matter of contracting debts. For definition and discussion of the term "debt" see 13 *Cyclopedia of Law and Procedure*, pages 393 and following, and cases cited in the notes.

In 1 *Smith on Municipal Corporations*, sections 4, 5, 6, the author divides public corporations into two classes, municipal corporations and public quasi corporations, and to these he adds a third class, quasi public corporations. The first includes incorporated cities, towns and villages; the second, counties, townships, school districts, etc., and the third railroad, grain elevator, telegraph companies, etc. The generic difference between the two first, the author says, lies in the fact that cities, towns and villages are created at the request, or at least with the consent, of their members and for their benefit, while public quasi corporations are mere local subdivisions of the state created by the sovereign will,¹⁵⁴ to exercise certain duties in aid of the state government, and inasmuch as the sovereign is not liable for neglect of duty the quasi public corporation acting for the state is not liable unless made so by statute, but that municipal corporations to whom are given certain powers to be exercised for the benefit of its inhabitants, in the doing of acts which the state does not do, are liable for the consequences of neglect of duty in the performance of those acts. The author also points out the distinction between acts of a municipal corporation in the discharge of its delegated governmental authority and these

in the discharge of its ministerial duty, holding that in the first the city is not liable for dereliction, and in the second it is. In a note to the text, section 6, note 20, the author says: "The rule stated briefly seems to be, that where a municipal corporation acts for a purpose purely and essentially public—acts as an agent for the state, and nothing more—the corporation is regarded as a part of the sovereign state, and cannot be sued for a tort, unless express permission by statute to bring such a suit has been given. But where municipal corporations act, as private corporations, for the local benefit and advantage of their members, they are liable in tort just as a private corporation would be."

In a very thoroughly-considered case on this subject the supreme court of Texas, after citing the leading authorities, English and American, shows that the accepted rule of law is that for neglect of duty in a matter of the kind then under consideration (failure to keep a street in reasonably safe condition), the city is liable in an action of tort, not by force of any statute, but by the common law: *City of Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 977.

The distinction between municipal corporations and what are above referred to as public quasi corporations in respect of their liability for neglect of duty is ¹⁵⁵ pointed out in 15 American and English Encyclopedia of Law, second edition, page 420 et seq.; also 2 Dillon on Municipal Corporations, fourth edition, section 996 et seq.

Reasoning along the lines above referred to we see that the liability of a city for allowing streets to remain so out of repair for an unreasonable time as to render them unsafe for use is a liability imposed by law; it does not depend on contract, it is not in the technical sense a debt. Then when we turn again to the clause in our constitution on which appellant relies we see that it refers only to the contracting of debts, and makes no reference to liability for torts; it leaves that matter as the common law left it.

In 20 American and English Encyclopedia of Law, second edition, page 1173, it is said: "A city cannot escape liability from an obligation arising ex delicto on the ground that its indebtedness has already reached the constitutional limit." And in a note to the text the author cites *McCracken v. San Francisco*, 16 Cal. 591; *People v. May*,

9 Colo. 404, 10 Pac. 641; Bloomington v. Perdue, 99 Ill. 329; Chicago v. Sexton, 115 Ill. 230, 2 N. E. 263; Bartle v. Des Moines, 38 Iowa, 414; Rice v. Des Moines, 40 Iowa, 638; Dallas v. Miller, 7 Tex. Civ. App. 503, 27 S. W. 298.

Thus it will be seen that the question now presented, although perhaps not heretofore expressly decided in this state, has received judicial consideration in other states which have similar constitutional limitations, and so far as the decisions have come to our notice they hold that for a neglect of duty of the kind now in question the city is liable, even though it has reached the limit of its power to levy taxes and contract debts.

It is not necessary to refer to any of the many cases in which we have held cities liable in such case without referring to the constitutional limitations referred to, because, as the learned counsel say, the constitutional question was not discussed, but now that our attention is expressly called to it we see no reason to ¹⁵⁶ take back anything that we have heretofore said on the subject of the city's liability for its negligence in failing to keep its streets in reasonably safe condition for use by the public. We hold that there is nothing in our constitution to limit that liability.

II. We come now to a consideration of the case on its merits.

The evidence for the plaintiff tended to prove as follows: The plaintiff, a married woman, was comparatively a stranger in the city of Nevada. About two weeks before the accident, she was passing through the city and stopped to spend one night with a friend; the next morning she was driven by her friend's husband in a buggy to the Union Depot along the street in which she afterward met with the accident. Two weeks later she returned to the city, arriving at the Union Depot, July 17, 1901, about 9 o'clock in the evening. She made inquiries of some persons standing at the depot for a conveyance of some kind to take her to her friend's residence, but finding no such conveyance she undertook to walk there.

The railroads passing the Union Depot on the east side run through the city north and south; there are about nineteen tracks. The business part of the city lies west of the depot, but the corporate limits extend about a half mile east of the same. The streets leading east from the busi-

ness part of the city toward the Union Depot terminate at the railroad tracks, except two, Locust street and Austin street, which, going east, cross the tracks and extend a half mile to the east limits of the city; at the east limits, Austin street extended becomes the county road. Austin street is one block south of the Union Depot, and Locust street is four blocks north of Austin. People living in the city east of the railroad tracks had to use either Austin or Locust street in going to or from the principal part of ¹⁵⁷ the city or the Union Depot. At the date in which we are now interested, Austin street was and had been for many years an open public thoroughfare. The city had caused it to be graded, gutter ditches on the sides made, and raised in the middle for a wagon road. On the north side of the street the city had constructed for a sidewalk a cinder path, but with wear and lack of repair it had become unfit for use, and the public, walking along the street, had fallen into the habit of walking along the north side of the wagon track, and a beaten path for pedestrians was well marked there by use. This path was on the south side of the gutter ditch, which had separated the cinder path from the wagon road. Some years before this accident the city had by ordinances granted one of the railroad companies a license to lay two switch tracks across the street about two hundred and fifty feet east of the depot, and the railroad company in its construction had made a wooden culvert under its tracks, extending beyond them five feet east, to carry off the water which came down a ditch along the west side of the switch tracks. At the east end of this culvert a hole had washed out about four feet deep and four or five feet wide, and had been there for several months before the accident. The beaten path above mentioned led directly across the switch tracks to this hole; the hole lay right in the way of one walking along the path. The people who knew of its existence were in the habit of following the path until the hole was reached and then turning to the right.

This was the condition of the street on the night when the plaintiff landed at the Union Depot and started to walk to the residence of her friend, and this street was the most direct route for her to take.

The plaintiff, with a two year old infant in her arms and a four year old infant holding her hand and walking

by her side, went from the Union Depot to Austin street, crossed the railroad tracks, and then took the footpath above described, and followed it on ¹⁵⁸ and across the switch tracks and on until it led her into this hole, into which she fell and received very severe injuries; her left leg was broken, her left ankle dislocated, and she was otherwise hurt.

At the close of the plaintiff's testimony defendant asked an instruction to the effect that plaintiff was not entitled to recover, which the court refused, and exception was taken.

The testimony on the part of defendant tended to show that the condition of the street was not as bad as the testimony for plaintiff indicated, and certain city officials were called, who testified that they did not know of the existence of this hole, never heard of it until after the accident, and in this particular contradicted one of plaintiff's witnesses who had testified that he had previously called the attention of those officials to the hole.

The plaintiff on her cross-examination had testified that in October following the accident, while her leg was yet in the plaster cast and the broken bone not united, she was riding with her husband in a vehicle when a wheel broke down and her broken leg received a jar and the broken joint slipped a little, but that it did not break again. Defendant's testimony on this point tended to prove that she had told the physician, whom she called to examine the injured limb and who took off the old and put on a new plaster cast, that she had broken her leg over again in that buggy accident.

Defendant now insists that the instruction calling for a nonsuit should have been given, first, because there was no legal evidence to show that this was a public street; second, there was no legal evidence to show that the street commissioners, under whose direction the street had been improved, were legal officers of the city, and, third, the plaintiff's own evidence showed that she was guilty of contributory negligence.

The first two of these grounds also appear in the ¹⁵⁹ record in the form of objections to the evidence and also in instructions refused.

1. The evidence on the part of the plaintiff to show that this was a public street which the city was in duty bound

to keep in repair, was that it had for many years been used by the public as a street; it had been graded and ditched and sidewalked (with cinders) by the city, under the immediate supervision and direction of the city street commissioner; the city by ordinances had granted the railroad company the license under which the switch tracks had been laid and the culvert constructed, but the evidence did not show an ordinance under which the street commissioner did the work. Appellant now says that in the absence of an ordinance authorizing the work to be done there is no legal evidence that the city assumed jurisdiction over the street or that the city officers were acting within the scope of their duties when they did the work. Appellant relies on *Downend v. Kansas City*, 156 Mo. 60, 79 Am. St. Rep. 545, 56 S. W. 902, 51 L. R. A. 970, to sustain that contention. But appellant does not have the correct conception of that case. The only evidence in that case offered to prove that the alleged street was a public street was that the city council had approved a plat of the proposed addition in which this was shown as a street, and the public had, for a time not specified, made some use of it. There was no evidence that any city officer had taken any authority over it or that any work had been done on it by the city. The court held that the approval of the plat did not impose on the city the duty to take charge of the street, and that the mere user by the public, as shown by the evidence, did not make it a public street which the city was bound to improve or keep in repair. On the contrary, the court in that case refers with approval to *Baldwin v. Springfield*, 141 Mo. 205, 42 S. W. 717, wherein, at page 212, speaking in regard to the obligation of the city to keep the streets in repair, it is said: "The latter obligation does not attach until the corporation, in some official and appropriate ¹⁶⁰ manner, has invited or sanctioned its use as a street by the public. But such sanction may be given by acts of its proper officers as well as by acts in the form of ordinances." See, also, *Buschmann v. St. Louis*, 121 Mo. 537, 26 S. W. 687.

The acts of the city street commissioners in the case at bar in causing the work of street construction that was done were sufficient to invite the public to use it as a

public street and sufficient to justify the finding that it was a public street.

2. The second proposition is that the evidence that these men who at different times occupied the office of street commissioner were street commissioners was incompetent to prove them such. The evidence was that of the men themselves who as witnesses testified that at the several dates mentioned they respectively held the office of street commissioner and did this work in that capacity.

Parol proof that a certain act appertaining to a particular public office was done by a man in possession of the office and acting in the capacity of such officer is competent evidence to show prima facie that the act was official: *Eads v. Wooldridge*, 27 Mo. 251.

3. There is no evidence tending to show that the plaintiff was guilty of contributory negligence. When she landed at the depot at 9 o'clock in the evening she made some inquiry for a vehicle, but none was there. What then could she do other than what she did? Of if, with the assistance of the retrospect, we can now think of something else that she might have done, can we say that what we now see would have been a better course was then and there so obviously the only prudent thing to do that there can be no doubt about it? As we now see it, it would have been far better if she had sat in the waiting-room at the Union Depot all night, but we are not to judge of her acts in the light of the subsequent occurrence, but in that of her then ¹⁶¹ surroundings. She walked down the street holding one infant in her arms and the other by the hand, trusting, as she had a right to trust, that the city had done its duty in keeping its street in a reasonably safe condition, and thus she walked on in the dark or the dim light until she fell into this pit.

The court did not err in refusing the instruction for a nonsuit.

4. The court refused the following instruction asked by the defendant:

"2. Although the jury may believe from the evidence that plaintiff's injuries are of a permanent character, so as to incapacitate her to enjoy life or cause her to suffer pain, yet if the jury are unable to determine from the testimony whether such injuries are made permanent by the new injury to plaintiff's limb, or the original injury or both in-

juries combined, then you will not allow any damage on account of said injuries being permanent."

The court at the request of the defendant gave the following instruction:

"10. If the jury should find for the plaintiff, then they should assess only such damages as she sustained on account of her fall in the street on the seventeenth day of July, 1901, and should not allow damages for any aggravation or increase of said injury caused by plaintiff's neglect of, or imprudence in using, her injured limb, or by any new injury to said limb, if any be shown by the evidence."

These two instructions were aimed at that part of the evidence that related to the alleged second injury to the plaintiff's leg. Whilst it was the duty of the plaintiff to have used reasonable care to promote a recovery, yet if she was guilty of no negligence in this respect and an accident happened to her in which the result was more serious because of her then condition than it would have been if she had not already been ¹⁶² afflicted, such more serious result in reality becomes the result of the first accident. There was nothing to indicate that the plaintiff was imprudent in this respect; the accident occurred by the breaking down of the wheel of the vehicle, but for which there would have been no jar, and but for the already broken and yet ununited bone in her leg the jar would have produced no ill-effect. The case does not call for a decision as to whether or not defendant was entitled to instruction numbered 10, which the court gave at defendant's request; therefore, we make no decision on that point. But if the defendant was entitled to have the consequences of that accident subtracted from the consequences of the first injury in the estimation of the damages, it got all that it was entitled to by force of instruction 10. There was no error in refusing instruction numbered 11.

5. The last insistence is that the damages assessed are excessive.

The testimony showed that the largest bone in the left leg was broken, it was an oblique break, and in consequence the plaintiff had been bedridden the most of the time until the trial, which was ten months after the accident and she was then still suffering and the expert testimony was that it would always give her trouble. Her ankle was also injured. The jury assessed her damages at three

thousand dollars, and we see no reason to complain of the award.

There are other points made in the brief of appellant relating to the giving and refusing of instructions, but they all come back to rest on the propositions above discussed and we see no propriety in lengthening out this opinion to discuss the instructions seriatim. There is no error in the giving or refusing of instructions of which the defendant has any cause to complain. The judgment is affirmed.

All concur, except Brace, P. J., absent.

The Fact that a City is Already Indebted beyond the constitutional limit is no defense to an action against it for a tort: See the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 234.

On the Liability of Municipal Corporations to persons injured by defective streets, see the monographic note to *Dudley v. Flemingsburg*, 103 Am. St. Rep. 257-295.

SMITH v. VERNON COUNTY.

[188 Mo. 501, 87 S. W. 949.]

REWARDS.—To be Entitled to Recover a Reward, one must establish a substantial compliance with all the provisions of the offer of reward. (p. 327.)

REWARDS —Conviction, When not Necessary to Recovery of. Under a statute authorizing an offer of reward for the arrest and apprehension of a person committing a crime, a person claiming the reward has no duty resting on him of convicting the person arrested, though the reward cannot be paid until such conviction and the offer of the reward purports to be for arrest and conviction. (p. 328.)

Rewards.—The Claiming and Receiving of Witness' Fees for Attendance at the Trial does not militate against the right to recover a reward for the arrest and conviction of the person testified against. (p. 329.)

REWARD, Compliance with Offer for, What Amounts to.—If an offer of reward is published for the apprehension and conviction of the murderer of P., one is entitled to such reward who discloses the whereabouts of the accused, and going there, arrests him on suspicion, causes him to be confined pending inquiry, and reports to the sheriff of the county where the crime was committed, whereby such sheriff is induced to come and claim the person so arrested and take him to the county where he is subsequently convicted. It is not necessary that the claimant of the reward should have conducted the prosecution of the accused, or have furnished evidence on which his conviction was secured. (p. 329.)

REWARD—Public Officers, When may Recover.—A Policeman of a municipality is not under any duty to ferret out and hunt up persons committing crimes in another state, and may, therefore, recover a reward offered by the proper authorities of another state for the apprehension of a person who has committed a crime therein, and having become a fugitive from justice, is found and apprehended by such policeman within the limits of the latter's state. (p. 331.)

REWARD, Necessity of Knowledge of Offer of.—Though an offer of a reward for the arrest of a person accused of crime has been made and published, one effecting such arrest without knowledge of, or reliance upon, such offer cannot recover. (p. 334.)

A. J. King, for the appellant.

Scott & Bowker, for the respondent.

⁵⁰³ LAMM, J. This cause comes here by virtue of article 6 of the state constitution as amended in 1884: See sec. 5 of said amendment.

⁵⁰⁴ Lying in small compass, few, simple and substantially agreed to, the record facts are as follows:

Smith, on the fourteenth day of July, 1901, was a member of the police force of Council Bluffs, Iowa, and there is evidence indicating that he was also at the time engaged in the detective business along lines not covered by his official duties as such policeman. On the third day of July, 1901, A. D. Paxton was murdered in Vernon county, Missouri, by one Alva Johnson, who fled the country and became a fugitive from justice. At some time undisclosed by the record, but between said date and the 15th of July, the state of Missouri offered a reward for his capture. On the fifteenth day of July, 1901, appellant county, through its county court, offered a similar reward in the following terms:

"The county court of Vernon county, Missouri, hereby offers a reward of one hundred dollars for the apprehension and conviction of the murderer of A. D. Paxton, which occurred on July 3, 1901."

This offer was published by being spread on record. On the day before this offer, to wit, on Sunday, the fourteenth day of July, Smith became aware of the receipt of a letter for Alva Johnson at the postoffice at Council Bluffs. The record is silent as to how he became aware of the fact that a murder had been committed in Vernon county, or that there was any ground for connecting Johnson with the commission of that crime. Johnson, it seems, had sent to the Council Bluffs postoffice by a messenger for his mail, and Smith learned of his whereabouts at a distant point in the county by

the inquiries and disclosures of the messenger. Armed with this information, on his own initiative, he went fourteen miles into the country, found Johnson on a farm, took him into custody on suspicion (without a warrant so far as the record discloses) and caused him to be confined in the city jail at Council Bluffs and held pending inquiry. For some cause not disclosed, on ⁵⁰⁵ the afternoon of the next day, the 15th, he telephoned the sheriff of Vernon county, and through him was informed that Johnson was wanted and on what account. On hearing Johnson was in custody and acting alone on the strength of information derived from Smith and the arrest made by him, the said sheriff, on the night of July 15th, was induced thereby to go to Council Bluffs, and on the next day or the one after that, identified Johnson, and thereupon Smith turned over his prisoner for the purpose of having him taken to Missouri and prosecuted for the Paxton murder. Thereat said sheriff brought Johnson to Vernon county, where, on the 19th of July, a warrant was procured to be issued and served upon Johnson. On the same day an information was filed in the Vernon circuit court charging Johnson with murder in the first degree. In the following October he was tried and convicted of a degree of manslaughter, on said information—Smith attending as a witness, testifying against him and claiming, and afterward receiving, witness fees for his attendance—and this conviction remains unappealed from.

The record is silent as to the date Smith became aware that the county, as well as the state, had offered a reward. It is certain the Vernon county sheriff, though he knew of the state reward prior to his Iowa trip, did not know of the county reward until after his return to Vernon county with Johnson, and therefore could not have disclosed the latter fact to Smith when in Iowa, and there is nothing in the record showing that Smith knew of the reward in question until some time after he turned over his prisoner. Smith claimed, and was paid, the state reward. The county court refused payment. On such refusal Smith sued, and on proof of facts above outlined, the court below gave judgment for him, the county appealing.

At the trial plaintiff asked the court to declare the law to be that on the facts proved he was entitled to ⁵⁰⁶ recover, and defendant asked the court to declare the law to be the

converse. The court gave plaintiff's and refused defendant's instruction.

In this court appellant insists the cause should be reversed because: 1. The evidence failed to show that respondent had complied with the conditions of the reward offered by the county; 2. Because plaintiff was a police officer at the time and was not entitled to a reward for the performance of his duty; and 3. Because the apprehension of Johnson was prior to the offer, without a knowledge, and not made on the faith of the reward by the county. Of these in their order.

1. To be entitled to recovery, one claiming a reward for the return of lost or stolen goods, or the mere apprehension, or the apprehension and conviction of a criminal, or for information leading to either, must establish his substantial compliance with all the conditions of the offer of reward (*Lovejoy v. Atchison etc. R. R.*, 53 Mo. App. 386, and cases cited; *Shuey v. United States*, 92 U. S. 73, 23 L. ed. 697; *Ralls County v. Stephens*, 104 Mo. App. 115, 78 S. W. 291); but conceding the foregoing fundamental proposition, there would seem to be no merit in appellant's contention, for the reasons following: the statute authorizing a county court to offer and pay a reward reads as follows:

"Whenever the county court of any county in this state, or any two judges thereof in vacation, shall be satisfied that any felony has been committed in said county, such court or judges may, at their discretion, offer a standing reward of not exceeding five hundred dollars for the apprehension and arrest of the person or persons committing the same, which reward shall be paid out of the county treasury; but in no instance shall any award, or any part thereof, be paid to any person who shall be entitled thereto until final conviction of the defendant": Rev. Stats. 1899, sec. 2474.

Starting out with the assumptions (1) that the county court had no power to offer a reward for the ⁵⁰⁷ arrest and conviction of a felon except such as may be found in the statute (24 Am. & Eng. Ency. of Law, 2d ed., 944, 945), and that (2) such county court had no power to go beyond and enlarge the terms of the statute in an offer of a reward for the arrest of one committing a felony, it will be seen that the statute is a warrant of authority to the county court to offer a certain kind of a reward, to wit, a reward "for the apprehension and arrest of the person or persons committing the same"—the word "apprehension" and the word "arrest"

having been construed by this court in *Cummings v. Clinton County*, 181 Mo. 162, 79 S. W. 1127, to be interchangeable terms—arrest meaning the same as apprehension. It will be seen, further, the statute does not contemplate that the party apprehending or arresting a felon had the duty resting on his shoulders of not only turning the criminal over to the law, but also of convicting him. The duty of conviction, after the felon is produced, is left by the statute where reason and law place it, in so far as a county reward is concerned, that is to say, upon the proper officers, in the proper court, and with the proper instrumentalities all under the wise safeguards of the law: *Thornton v. Missouri Pac. R. R.*, 42 Mo. App. 64. The ends of justice, however, are reached by the proviso in the statute to the effect that such reward shall not be paid out of the county treasury until after the final conviction. This proviso not only protects the state from imposition, but it compels the surrender of the prisoner after his apprehension, stimulates the interest of the reward claimant in the prosecution, tends to secure his testimony as a witness if he possess any knowledge advantageous to the state, and going beyond a bare arrest, it tends to produce the ultimate result aimed at, to wit, a conviction.

When Vernon county offered a reward, as it did, "for the apprehension and conviction" of the murderer of A. D. Paxton, it is not fair to conclude that the word "conviction" used in the offer, was used in any other ⁵⁰⁸ sense or for any other purpose than that contemplated by the statute itself, and this results because, in the absence of controlling facts showing a contrary intent, the offer made by the court ought to be presumed to have been intended to be in strict compliance with the grant of power in the statute, and not otherwise. Construing the offer and the statute together and reading the statute into the offer, the offer means, in effect, that for the apprehension of the murderer of Paxton, the county court will pay one hundred dollars, but not until after "final conviction of the defendant."

Did respondent comply with the terms of such offer, excluding for the moment his acting on the faith thereof? We think he did. It is undisputed that he apprehended the murderer unaided, on his own initiative, at his own expense and hazard, and put him in the hands of justice. It is undisputed that he took proper interest in the prosecution, that he attended the trial in a distant state, where he was under no

legal obligation to go and where his attendance could not be obtained by compulsory process, that he contributed to the conviction by furnishing all the facts within his knowledge as a witness, and that a final conviction resulted.

The contention of appellant that Smith was paid his witness fees is of no significance. Whether these fees amounted to his outlay, we know not, nor does it matter. There is no provision of law to the effect that a reward claimant may not, nor does it at first blush seem *contra bonos mores* that he may claim and be paid witness fees without thereby militating against his right to an offered reward. The statute offers his fees, the statute likewise provides for the reward, both offers spring from the same source, are of equal dignity, are not inconsistent, and why should they not be simultaneously operative?

There is a class of cases where rewards are offered by private individuals for the conviction of criminals ⁵⁰⁹ in which courts have laid stress upon the failure of the reward claimant to take active steps to procure a conviction—in some instances by not employing counsel to prosecute, by not swearing out a warrant, by lying by and not assuming the necessary burdens of a prosecution, etc.—but such cases, of which *Lovejoy v. Atchison etc. R. R.*, 53 Mo. App. 386, is a sample, do not lay down a doctrine that ought to be applied with rigor to a case like the one at bar, where the right to offer a reward is bottomed on a statute and where the terms actually offered can be harmonized with the terms set forth in the statute, and which statute lays no duty upon the reward claimant to prosecute or convict other than his implied duty of aiding in a reasonable way by frank disclosures of all facts, and as a witness at the beck and call of the state.

It results from these views that appellant's first contention, to wit, that respondent did not comply with the terms of the offer of reward, must be disallowed.

2. Does respondent's official position defeat recovery? At common law it was uniformly held that a promise to pay an extra statutory compensation to a public officer for the performance of his legal duty could not be enforced. Such contract was void as against public policy. Some adjudications put it this way: actions founded on promises for extra statutory compensations are scandalous and shameful, and officers on whom the law casts a duty to ferret out crime, hunt down the offenders and bring them to public justice, must be con-

tent with legal fees—seasoned, possibly, by a dash of sentimental satisfaction arising from the contemplation of the fact that they have done the state some service; by other courts such contracts have been put on the foot of oppression and extortion. Serjeant Hawkins, in his Pleas of the Crown (1 Hawkins' Pleas of the Crown, c. 68, sec. 4), states his views as follows:

“Also it having been found by experience that generally it is vain to expect that any officers who depend ⁵¹⁰ upon a known fixed salary, without having any immediate benefit from any particular instances of their duty, should be so ready in undertaking, or diligent in executing them, as they would be if they were to have a present advantage from them; it hath been thought expedient to permit them to take certain fees in many cases, but it is certain that they are guilty of extortion, if they take anything more. Also it hath been resolved that a promise to pay them money for the doing of a thing which the law will not suffer them to take anything for is merely void, however freely and voluntarily it may appear to have been made; for if once it should be allowed that such promises could maintain an action, the people would quickly be given to understand how kindly they would be taken, and happy would that man be who could have his business well done without them.”

The reasons thus aptly put by Hawkins are soothing to the legal mind, have been adopted by standard text-writers, and commanded an indorsement from the strong pen of Judge Scott (*Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658), and the rule itself, to promote health in the body politic, ought to be sustained in undiminished vigor. Nevertheless, in applying it, discrimination should be used to fit it only to a case within the common sense of the thing and where the benefit will be advanced and the mischief retarded. The mischief struck at is obvious; and a public officer, under a bounden oath to perform a certain official duty, for the performance of which a legal fee or salary is provided by law, is the character of person within the spirit and letter of the rule.

In this case, not only does the evidence indicate that Smith was carrying on the business of a detective on his own hook, as well as performing the duties of policeman of Council Bluffs, but even if the service performed by him be referred solely to his character as a policeman, what present, legal duty devolved upon him as a municipal officer of Council Bluffs to

ferret ⁵¹¹ out and hunt down an escaped Missouri murderer, hid in the obscurity of the country miles distant from that town? Appellant's counsel has pointed out no such duty, and there is none within our ken. To the contrary, the performance of that service may well be placed without the duty prescribed by law for a domestic policeman (though that question is not in this case), let alone one of a foreign jurisdiction: *Bronnenberg v. Coburn*, 110 Ind. 169.

What pay in legal fees is vouchsafed by the statutes of Iowa or the ordinances of Council Bluffs for the performance of such extraordinary service as Smith rendered under this record? None is contended for. Those services were prompt, intelligent and so peculiar as to bespeak recognition and bounty, if an award of bounty can be made without doing violence to recognized legal principles; for instance, without a warrant, on mere suspicion, Johnson was arrested and held in custody, and, without requisition papers, through the aid of Smith, he was brought from Iowa to this state. There was a hazard here, had the suspicion been unfounded or the result fallen short of a conviction, for vexatious suits, and we cannot conceive how this personal hazard in the arrest and the expenses incurred in and about this service arose as his due to the commonwealth of Missouri, or how they came within the mandate of his official oath, or within the solatium of his official salary or the fees provided by his master, the state of Iowa and the municipality of Council Bluffs.

So that, not coming within the reason of the rule, we are unwilling to hold that the mere fact of his being a policeman in a foreign jurisdiction should deny him the right to claim the reward in question. While there are cases out of line with these views, yet our holding is believed to be sustained by the greater weight of the well reasoned out cases: *Cornwell v. St. Louis Transit Co.*, 100 Mo. App. 258, 73 S. W. 305; 24 Am. & Eng. Ency. of Law, 2d ed., 953, and cases cited. And by the books ⁵¹² generally: *Throop's Public Officers*, c. 20; *Wood on Master and Servant*, 2d ed., sec. 170.

3. This brings us to the consideration of the last and the most serious question in the case, viz., the offer of a reward by Vernon county was made the day after the apprehension of Johnson, was made without the knowledge by respondent of, and, so far as shown by the record, without reliance on the reward sued for. On such state of facts appellant bases the insistence that there can be no recovery.

- The cases are in hopeless conflict on this question. On the one side is a line holding to the theory that knowledge of the offer of a reward is not necessary. The reasoning of this line of cases is felicitously expressed in *Auditor v. Ballard*, 72 Ky. 572, 15 Am. Rep. 728, thus: "But it is said that the appellee is not entitled to the reward because he did not know at the time he arrested the fugitive and delivered him to the jailer that one had been offered, and therefore the services could not have been performed in consideration of the reward. If the offer was made in good faith, why should the state inquire whether appellee knew that it had been made? Would the benefit to the state be diminished by a discovery of the fact that the appellee, instead of acting from mercenary motives, had been actuated solely by a desire to prevent the escape of a fugitive and to bring a felon to trial? And is it not well that all may know that whoever in the community has it in his power to prevent the final escape of a fugitive from justice, and does prevent it, not only performs a virtuous service, but will entitle himself to such reward as may be offered therefor?" To the same effect are *Dawkins v. Sappington*, 26 Ind. 199; *Eagle v. Smith*, 4 Houst. (Del.) 293; *Drummond v. United States*, 35 Ct. of Cl. 356; *Russell v. Stewart*, 44 Vt. 170. This is also the doctrine of the English courts: *Williams v. Carwardine*, 4 Barn. & Adol. 621, 1 N. & M. 418, 5 Car. & P. 566; *Neville v. Kelly*, 104 Eng. Com. L. 740, 12 Com. B., N. S., 740, 32 L. J. C. P. 118, 10 Week. Rep. 697.

On the other hand is a line of cases holding that ⁵¹³ knowledge of the offer and a resulting reliance upon it in performing services are essential elements in the recovery of a reward. This line of cases is based on the theory, everywhere recognized, that an offer of a reward is the same as any other contractual offer, and must be known and accepted by being acted upon. If the promise of a reward is to be brought, as seems sensible, within the classification of a contract, it is impossible to see how any other conclusion can be logically arrived at; for in every contract there must be an *aggregatio mentium*, and how can a meeting of minds exist without the acceptance of an offer express or implied or arising, at least, from some fiction of law? That the absence of knowledge of the offer and the absence of performance of services on the faith of the offer, are barriers to recovery is reasoned out on principle by a philosophical writer, Dr. Wharton (1

Wharton on Contracts, p. 50 et seq.), by Story (1 Story on Contracts, 5th ed., sec. 493), and other authors, and is the doctrine of many courts of last resort (*Williams v. West Chicago St. Ry.*, 191 Ill. 610, 85 Am. St. Rep. 278, 61 N. E. 456; *Howland v. Lounds*, 51 N. Y. 607, 10 Am. Rep. 654; *Stamper v. Temple*, 6 Humph. 113, 44 Am. Dec. 296; *Abel v. Pembroke*, 61 N. H. 357; *Wilson v. Stump*, 103 Cal. 255, 42 Am. St. Rep. 111, 37 Pac. 157; *Hewitt v. Anderson*, 56 Cal. 476, 38 Am. Rep. 65), and is within the rationale of other cases, where the point was not directly involved.

The question in this state is somewhat open, but the dicta of our courts show the trend of the Missouri judicial mind to be toward the latter view. For example, in *Cummings v. Clinton County*, 181 Mo. 167, 79 S. W. 1127, Burgess, J., comments on plaintiff's knowledge of the offer of the reward and his performance of service upon the faith of the offer.

Ralls County v. Stephens, 104 Mo. App. 115, 78 S. W. 291, was a case in which the reward was paid into court, and the contest was between rival claimants, Stephens, Carter and Testerman, interpleaders. The reward being adjudged to Stephens, Testerman acquiesced and Carter ⁵¹⁴ appealed. While the controversy between Stephens and Carter rode off on the theory that, although Carter arrested the fugitive, he did so as the agent of Stephens, yet, arguendo, the court commented on Stephens' knowledge of the offer and on the fact that the services were rendered by him on the faith thereof, while Carter was ignorant of the offer. This case amounts to an adjudication that as between two persons claiming a reward, the one who knew of the offer, performed services on the faith of it, and procured the other to make the arrest, had a better title to the reward than the one who actually made the arrest, not knowing or relying on the reward.

In *Sanderson v. Lane*, 43 Mo. App. 158, S. bought a stolen horse; L., a city marshal, knowing of a reward, went to the house of S. in his absence, informed the brother of S. that the horse was stolen, pointed it out and said that he had come for it, paid four dollars for the keeping of the horse, took it away, delivered it to the owner, and received the reward. Neither S. nor his brother knew of the offer of reward. S. sued L. for the reward, recovered below, and L. appealed. The judgment was reversed upon the ground that plaintiff neither knew of the reward nor did he return the horse.

It would serve no useful purpose to seek to disturb the reasoning of the foregoing cases, which seem to be in line with the better American doctrine, although if the question was entirely *res integra* we might be inclined to adopt the persuasive reasoning of *Auditor v. Ballard*, 72 Ky. 572, 15 Am. Rep. 728.

We lay no stress upon the mere fact that respondent made the arrest before the reward was offered, and this is so because it appears from the record that the prisoner was not delivered over until after the 15th of July, the date of the offer of the county reward. The state of Missouri was interested in a result, and not in a bare arrest. The delivery of the prisoner was a necessary step for respondent to take before his services, ^{\$15} which commenced with the arrest, were so far consummated that the result aimed at, to wit, a conviction, could be attained; in other words, the bare arrest was prior to the offer, but was consummated by a delivery after the offer. This might be well enough were it not for the trouble arising from the fact that even when the delivery of the prisoner to the officer occurred, respondent, so far as this record speaks, was in ignorance of the offer of a county reward, and did not perform that portion of his services in reliance on such offer, nor is there any averment of the petition directed to such fact.

It has not escaped us that respondent contends he "asked an officer of Vernon county at the time he performed the service, about the reward, showing clearly an intention to claim the reward, if there was any, for the services he performed." Nor has it escaped us that respondent further contends "the agent of the county misinformed him in regard to reward." These contentions of respondent find no support in the testimony, and, since he was not called upon to testify, they may be an echo of facts existing *dehors* the record and which may be supplied at a retrial.

The petition is defective in not averring a knowledge of and a reliance upon the reward as a consideration for the services of respondent. The proof is wanting upon this essential element in the case. It is possible that on an amended petition and at a retrial the deficiency may be supplied.

The cause is accordingly reversed and remanded with leave to respondent to amend his petition if he see fit, and then to be proceeded with in accordance with the views of this court on the law, without either party being precluded on the facts.

All concur.

A Reward cannot be claimed, according to many authorities, by one who renders services in ignorance of the offer of a reward: *Williams v. West Chicago St. R. R. Co.*, 191 Ill. 610, 85 Am. St. Rep. 278; *Everman v. Hyman*, 26 Ind. App. 165, 84 Am. St. Rep. 284, and see the cases cited in the cross-reference note thereto. For authorities taking a contrary view, see the note to *Hayden v. Souger*, 26 Am. Rep. 6, 7.

A Peace Officer may Recover a Reward when the services rendered are extraofficial, but not when they are rendered within the scope of the duties of his office: *Kinn v. First Nat Bank*, 118 Wis. 537, 99 Am. St. Rep. 1012, and see the cases cited in the cross-reference note thereto.

COLONIAL TRUST COMPANY v. McMILLAN.

[188 Mo. 547, 87 S. W. 933.]

CORPORATIONS, Watered Stock, What is.—Stock for the purpose of consolidating the franchises, property, and business of two corporations, both of which are heavily indebted and insolvent, is watered stock. (p. 349.)

PRACTICE.—A Finding of Facts by the Trial Court in an action where no jury is called is as binding on the appellate court as the verdict of a jury. (p. 349.)

CORPORATIONS—Watered Stock, Persons Acting with Knowledge of.—One who knew when he became a creditor of a corporation that its stock had been watered, and issued without the payment of its par value, is not entitled to recover from a stockholder the amount of the subscribed value of such stock remaining unpaid. (p. 350.)

CORPORATIONS, Pledge of Stock, What is.—Though stock is issued by a corporation directly to the person named therein as holder, yet if it was issued to him to secure the performance of an agreement, he is a pledgee, and not a stockholder, and cannot be held liable to a creditor of the corporation on the ground that the certificate falsely recited that it was fully paid. (p. 351.)

CORPORATIONS—Pledgee, Character of not Changed by His Demanding Resignation of Officers.—Where stock was issued by a corporation to secure the performance of an agreement, the person named therein is not deprived of his right to insist that he is a pledgee only, by the fact that he demanded and received the resignation of all the officers and directors of the corporation, if he never at any time acted in the capacity of a shareholder. (pp. 351, 352.)

CORPORATIONS—Pledgee of Stock, When not Converted into a Stockholder by a Forfeiture Agreement.—A clause in an agreement to the effect that if a person who is a pledgee of stock is not relieved from specified responsibility in the time designated, the stock is to become his, does not, on the happening of the contingency referred to, under the laws of New York, acquire the title to the stock so pledged, nor subject himself to the liability of a stockholder. (p. 352.)

CORPORATIONS—Pledge of Stock, Liability of.—A pledgee of stock, though it was issued to him directly and stands in his name on the books of the corporation, is not liable to an action brought by a creditor of the corporation on the ground that the stock has been fully paid. (pp. 352, 353.)

W. J. Stone, Judson & Green and R. T. Brownrigg, for the appellant.

Edward S. Robert, for the respondent.

⁵⁵¹ LAMM, J. In an action at law, tried to the court without a jury, the plaintiff, as a judgment creditor of the Sedalia Electric and Railway Company, referred to herein as the railway company, seeks to hold defendant liable as a stockholder, owning two thousand five hundred and ninety-four shares of unpaid capital stock of said railway company, of the par value of \$259,400, for the sum of \$47,076.75, said judgment debt. The result of the trial was a judgment for defendant, from which plaintiff appeals.

It will contribute to an understanding of the case to state the paper issues which are substantially as follows:

After alleging its incorporation and citizenship in New York, and the incorporation of the Sedalia Electric and Railway Company under the laws of the state of Missouri, the petition avers that said railway company became indebted to the plaintiff, for money loaned, in the sum of \$105,000, evidenced by a promissory note dated the 1st of November, 1898, due in one year, with interest at the rate of six per cent, payable quarterly, which note was indorsed and guaranteed by Stewart & Co., and was secured by the pledge of certain bonds and stock of said railway company as collateral; that payments were made by said makers, indorsers and guarantors, and by the sale of said pledged collateral, whereby the principal was reduced to \$44,550, which, with interest, remained due and unpaid to plaintiff. That on the 17th of October, ⁵⁵² 1900, plaintiff, having theretofore instituted suit against said railway company in the circuit court of the United States in the central division of the western district of Missouri to recover said balance, did recover the same with costs, and thereafter sued out execution, upon which the marshal made return of nulla bona; that said railway company is wholly insolvent and has ceased to do business or to per-

form any of the purposes of its creation and has ceased to be actively governed, managed or controlled by its board of directors or officers, and has become virtually defunct and dissolved; that said indorser and guarantor, Stewart & Co., was one Stanley H. G. Stewart, who did business as a "banker or broker" in the city of New York and is now insolvent; that the bonds and stock pledged for the payment of said note were sold by plaintiff and the net proceeds applied on the note; that said judgment of the federal court remains wholly unpaid; that said railway company was organized with a capital stock of \$400,000, divided into four thousand shares of the par value of \$100 each; that defendant is owner and holder of two thousand five hundred and ninety-four shares of said capital stock, originally subscribed by one Reeve, who paid nothing on said stock in money, property or services, notwithstanding which the shares of stock were issued to him; that on the ninth day of December, 1898, Reeve transferred his said stock certificates to defendant, so that he became and was thereafter the owner of said stock; that defendant well knew Reeve had paid nothing on said stock, knew the whole amount of Reeve's stock subscription was still due said railway company and knew that said railway company was at the time largely indebted to plaintiff and other creditors; that by reason of the premises defendant is indebted to said railway company in the sum of \$259,400, whereby a right had accrued to plaintiff as a creditor to have and recover from the defendant the amount due plaintiff by said railway company, to wit, ⁵⁵³ the said sum of \$47,076.75, together with interest at six per cent since the seventeenth day of October, 1900, etc.

The case was tried on an amended answer admitting the incorporation of the plaintiff, the incorporation of the railway company, its original indebtedness to plaintiff in the sum of \$105,000, evidenced by the note referred to; admitting that Stewart & Co. indorsed and guaranteed the note and that certain bonds and stocks were pledged to secure its payment as alleged; admitted the railway company was organized with the amount of capital stock and number of shares and par value of each share as alleged, and admitting the stock was originally subscribed by Reeve, but denying *seriatim* and specifically the other allegations in the petition.

For affirmative defense, the answer pleads that at the time the stock was issued it was agreed by the railway company and the stock subscribers that the railway company should accept the conveyance of certain real estate, buildings, apparatus, electric light plant, electric street railway plants, and other property, interests and franchises in full payment for all stock to be issued; that said railway company would issue such stock fully paid and non-assessable, and that no persons holding any of said stock should remain or be liable for any further payment on account of the same; that the conveyances aforesaid were made and the agreement completed, the railway company put in possession, etc., and the said stock was so issued and delivered and bore upon its face the express agreement that it was fully paid and nonassessable; that the property, interests, franchises, etc., so conveyed, were at the time of a value equal to the face value of said stock; that at the time and in said matters the directors of said railway company and its officers and all persons connected with said transaction acted in good faith and in the honest belief that the value received by the railway company was equal to the amount of the face ⁵⁵⁴ value of the stock, and all said directors, officers and persons exercised all reasonable caution and their best judgment in the premises, etc.

For a further defense it is alleged that before it advanced money to said railway company upon said \$105,000 note and at the time, plaintiff had full notice of said facts connected with the issuance of said stock as well as of the value of the franchises, interests, etc., conveyed to said railway company as a consideration for the stock, of the amount of stock issued and its full value, of the business to be conducted by said company, and of the plan of its organization, capitalization and operation.

As a further defense it was alleged that at the instance and request of said Stewart, and after plaintiff had agreed to make said \$105,000 loan, defendant executed a certain underwriting agreement to which Stewart & Co., other underwriters and plaintiff were parties, whereby defendant agreed that he would, if required so to do by plaintiff, any time between the first day of September, 1899, and the second day of October, 1899, but not otherwise, purchase and take from plaintiff sixty bonds and six hundred

shares of the capital stock of said railway company, then in the hands of plaintiff, and that he would in that case pay therefor at the rate of \$750 for each bond, together with ten shares of said stock (said plaintiff, however, having the privilege of selling said bonds and stock to others upon terms set forth in said underwriting agreement), and for the purpose of inducing him to execute it, said Stewart agreed he would secure other persons to underwrite the bonds and stock so underwritten by defendant and would substitute such other persons in the place and stead of defendant as a party to said underwriting agreement and would procure plaintiff to release defendant from said underwriting agreement; that to secure the carrying out of said Stewart's agreement, he, Stewart, caused to be issued and lodged with defendant a certificate ⁵⁵⁵ for two thousand five hundred and ninety-four shares of the capital stock of said railway company, which was received and has at all times been held by defendant as collateral security to secure his release from any obligations growing out of said underwriting agreement and to insure the substitution of other underwriters in his place and stead, and for such purpose only; that defendant is not and never was the owner of said shares of stock or any of them, but that his sole interest, so far as he had any interest, has been that of a pledgee to secure the performance by Stewart of said agreement, and that at the time of the pledge of said stock to defendant and at the time he signed said underwriting agreement, he had no notice or knowledge that the consideration given or paid said railway company in the issuance of its stock was of less value than the stock itself, or of any facts concerning the subscription or payment for said stock, but received and held said certificate as pledgee in reliance upon the representation contained in said certificate that the shares of stock were full paid and nonassessable.

The answer finally alleges that the underwriting agreement executed by defendant was a part of the collateral security deposited with and pledged to plaintiff to secure the payment of said \$105,000 note; that by said agreement all sales of said bonds and stocks were to be received by plaintiff and applied toward the satisfaction of said note; that plaintiff did not at any time between the 1st of September, 1899, and the second day of October,

1899, require defendant to purchase or pay for any of said bonds or stock, but did, without defendant's consent, and in spite of the refusal of defendant to join therein, enter into another agreement with the other parties to said underwriting agreement whereby it extended said underwriting agreement and the time within which the same was to be performed, and thereby released and discharged defendant.

⁵⁵⁶ The reply to the amended answer denied each and every allegation thereof.

The case made on the facts is as follows: Prior to October, 1898, there existed in Sedalia two corporations, one known as the Electric Railway Light and Power Company of Sedalia, hereinafter referred to as the power company, and the other known as the Sedalia and Brown Springs Electric Railway Company, hereinafter called the Brown Springs company. The power company was the elder of the two, and owned about nine miles of street railway track, a power-house, engines, boilers, electric generators, lighting wires, a street railway franchise in Sedalia, an electric lighting franchise, together with a park outside the city limits, and was engaged in running electric passenger-cars, and the generation and sale of electricity for light and power purposes in the city. Upon all its properties and franchises was a mortgage of \$200,000. The Brown Springs company was a servient corporation owning about two miles of track, extending south from the southern terminus of the track of the power company, and also owning one hundred and twenty acres of land and a spring, possibly of medicinal virtues, but owning no rolling stock or power-house, and was operated by the power company. On the assets and properties of the Brown Springs Company was a mortgage of \$50,000, which indebtedness was guaranteed by the power company. These two properties were practically operated as one. Both of them were in bad condition and though the interest on the mortgage debt was kept paid, yet they had a floating indebtedness of from \$50,000 to \$60,000, with an earning capacity inadequate to pay fixed charges and operating expenses, let alone to provide for needed repairs and betterments. In this condition of things Stanley H. G. Stewart, masquerading as Stewart & Co., a so-called "banker and broker" of the city of New York, appeared

on the scene through a representative, made an investigation of these properties ⁵⁵⁷ and franchises and undertook the scheme of consolidating them into a new corporation and rehabilitating the property. To this end he purchased the stock in both companies in August or September, 1898, for an uncertain consideration, which may be termed a song, assumed the payment of the floating indebtedness and, thereafter, on the third day of October, 1898, he caused to be organized a new corporation, the Sedalia Electric and Railway Company, as a receptacle for all said properties and franchises. This new corporation was on the basis of a capitalization of \$400,000, divided into four thousand shares of the par value of \$100 each. In the articles of association it was certified that "the whole amount thereof has been bona fide subscribed and all thereof actually paid up in lawful money of the United States, and is in the custody of the persons named as the first board of directors"—not one word of which was true. The uncontradicted evidence shows that it was contemplated that the stock should be and was paid for by turning over the franchises and the properties of the power company and the Brown Springs company, already mortgaged far beyond their value, the cars and most of the machinery out of repair, second-hand and depreciated by wear, and it was further shown that the reasonable expectancies of these properties were not bright at the time and the companies were struggling with makeshifts from day to day to make ends meet, and insolvent. On the incorporation of the railway company, it took over said franchises and properties, subject to the mortgage indebtedness. Of the four thousand shares of capital stock, Reeve subscribed and received three thousand nine hundred and ninety-six shares, which he held for Stewart. The other four shares were distributed between one DeLong, a resident of New York, and three other parties, residents of Sedalia, Missouri, to qualify them as directors.

While Mr. Stewart posed as a capitalist, he was one by way of aspiration and anticipation only. His ⁵⁵⁸ scheme was to issue and float a bonded indebtedness of \$400,000, secured by a mortgage on the consolidated properties—\$260,000 worth of these bonds were to be set aside to take up the existing and underlying mortgages on the constituent properties, and the other \$140,000 of bonds were to

be floated on the markets of the east, at \$750 in cash for each \$1,000 bond and, as a lure to purchasers, ten shares of stock were to go with each bond as floated. As a step to float these bonds a prospectus was prepared setting forth in glowing colors the original cost and past earning capacity of the constituent companies, the consolidation, a list of assets and the properties owned, their present earning capacity, and future possibilities in the growth of the city and the increased earning capacity of the rehabilitated plant. In the prospectus the fetching bargain was offered of selling a \$1,000 gold bond at \$750, with ten shares of stock of the par value of \$1,000 thrown in. With this prospectus in his hand he went to appellant trust company and undertook to negotiate the bonds and stock. There is evidence that on examination the scheme was rejected, at the start, and there is further evidence tending to show that the president of plaintiff, Mr. Borne, had looked into the prospectus and was aware of the fact that the stock represented what he called "sentimental" instead of actual value. Later, an underwriting plan was concocted and on the strength of the deposit and pledge of one hundred and forty \$1,000 bonds of the railway company, together with certificates of stock representing fourteen hundred shares, and the execution of the underwriting agreements of defendant McMillan and others, the collateral note of the railway company for \$105,000, due in one year, with interest payable quarterly in advance at six per cent indorsed by Stewart & Co. and guaranteed by Stewart & Co., was discounted.

Prior to and at this time respondent was surety for Stewart at the Hanover National Bank in New York ⁵⁵⁹ for \$41,000, then over due. The railway company's bonds being not yet engraved and executed, an "ad interim bond" for \$140,000 had been executed, but the evidence is not clear whether it was pledged to the defendant to indemnify him against loss as Stewart's surety at the Hanover National Bank or left with appellant trust company as temporary collateral. Be that one way or the other, respondent was secured from liability at the Hanover bank by pledge of that or other collateral.

At this stage Stewart being pressed, as usual, for funds in his promoting schemes, applied to respondent to become an underwriter on the bonds to be deposited with the plaintiff

trust company, assuring him that from the proceeds of the loan thereby secured, the indebtedness at the Hanover National Bank was to be (and was) taken up, and pressing debts against the railway company paid off.

As it is contended by appellant that respondent became the owner of all the stock issued by the railway company except such as was to be and was pledged as collateral to the appellant, and enough more to qualify the directors of the railway company, and as it is contended by respondent that he merely became the pledgee of such stock as collateral security against his liability and loan of credit as an underwriter, the relations between the two men at the time become material. On this head the record shows that respondent was a capitalist and the father in law of Stewart. The two men officed in the same building, and, were it not for the written communications passing between them and introduced in evidence, it would be difficult to believe their feelings and relations were as strained and unique as we are forced to conclude from the record before us; for they met at respondent's home and yet did not speak, but corresponded and acted through intermediaries, and respondent seems to have entertained business distrust of Stewart and to have a rooted antipathy ⁵⁶⁰ for him based on alleged business injuries. Stewart, on the other hand, was compelled from a settled business policy and his family relations, to ignore the antipathy of his father in law and to seek his aid as a harbor when adverse financial gales blew, as, under this record, they did with regularity for him. The underwriting scheme lagged, enough subscribers had not been obtained, and, in this dilemma, he applied by letter to his father in law for help. The result was that respondent and Stewart, after propositions pro and con, entered into an agreement between themselves that respondent should go into the underwriting scheme, and that Stewart would turn over to him two thousand five hundred and ninety-four shares of stock in the railway company, which agreement is best shown by the following letter from Stewart:

"Replying to your favor of the 2d and 4th, I have consulted with the attorney having charge of the matter of loan with the Colonial Trust Company, and he has agreed to undertake that, providing we carry out the underwriting on the present basis, he will arrange for the substitution of name or names to take the place of yours, and I will therefore accept your offer on the basis outlined, which I understand to be

as follows: In consideration of your underwriting 60 bonds as per written agreement inclosed, with ink interlineations which you will notice, I herewith place with you 2594 shares of the capital stock of the Sedalia Electric and Railway Company, issued in your name. This leaves 1400 shares to be deposited with the Trust Company under the terms of said underwriting agreement and the six shares necessary for qualifying the directors. Attached to the stock please find the resignation of the president, treasurer, assistant secretary, and majority of directors; the vice-president has not been elected yet, and the secretary is in Sedalia, as it was necessary to have that officer there temporarily, until all of the papers relative to the consolidation had been properly executed, but we can have his resignation at any time ⁵⁶¹ now. It is understood that if within 90 days from date we relieve you from all responsibility under said underwriting, then said stock and resignations are to be returned to us as per terms of your letter; if on the other hand you are not relieved, the stock to become yours. All arrangements are made with the Trust Company and they propose to close the matter this afternoon. May I therefore suggest that you kindly sign the underwriting agreement inclosed herewith and, upon the matter being settled with the Trust Company, we will draw a check to your order for \$41,000 and upon receipt of same, you can deliver the interim bond for \$140,000 to the Colonial Trust Company, getting your check cashed at the same time, which will pay for the loan at the Hanover National, minus three or four days' interest, which we will pay. If the above properly represents your wishes expressed in said letter, I will have the arrangements put in such further legal form as you may desire.

Yours very truly,

“STANLEY H. G. STEWART.

“P. S.—After writing the above yesterday, we found the Trust Company wishes the underwriters to agree to substitution of the ‘interim bond’ until the permanent ones were ready (the bonds are promised Tuesday) and they are getting the agreement signed this morning by the others. It will be sent to you later.”

On the strength of the agreement outlined above, respondent executed the following underwriting agreement covering sixty \$1,000 bonds with plaintiff trust company:

“Underwriting Agreement.

“Agreement made the first day of November, 1898, between Emerson McMillan (hereinafter called the Underwriters), parties of the first part; Colonial Trust Company, of the City of New York, a corporation ⁵⁶² organized and existing under and by virtue of the Laws of the State of New York (hereinafter called the Trust Company), party of the second part, and Stewart & Company, doing business as Bankers in the City of New York (hereinafter called the Bankers), parties of the third part.

“Whereas, Stanley H. G. Stewart of the City of New York, doing business as Bankers at No. 40 Wall Street in the said City, under the firm name of Stewart & Company, have purchased and recently consolidated the properties known as the Electric Railway, Light & Power Company of Sedalia, Missouri, and the Sedalia and Brown Springs Electric Railway Company, merging the same into a new company under the name of the Sedalia Electric & Railway Company; and

“Whereas, the Trust Company is about to make a loan of one hundred and five thousand dollars to the said Sedalia Electric & Railway Company, at the request of Stewart & Company, which loan is to be evidenced by the promissory note of the said Sedalia Electric & Railway Company, indorsed by said Stewart & Company, and payable in one year from the date of this agreement, with interest at six per cent per annum, payable quarterly in advance; and

“Whereas, said loan is to be secured by one hundred and forty of the bonds of the said Sedalia Electric & Railway Company, with fourteen hundred shares of the capital stock of the said company, said bonds and stock being now owned by said Stewart & Company; and

“Whereas, the Underwriters are desirous of purchasing certain of said bonds of the Sedalia Electric & Railway Company held under said loan;

“Now, Therefore, This Agreement Witnesseth, That the Underwriters, in consideration of one dollar and other valuable considerations, the receipt whereof is hereby acknowledged, do each for himself or themselves, and his or their heirs, executors and administrators, ⁵⁶³ and not for the others, agree with the Trust Company that after the first day of September, 1899, and on or before the first day of October, 1899, the said Underwriters will purchase, upon the demand of the Trust Company, the number of bonds of one thousand

dollars par value each of said Sedalia Electric & Railway Company, now in possession of the Trust Company, the number of shares of said stock of one hundred dollars par value, set opposite their respective names, and pay therefor the sum of seven hundred and fifty dollars for each bond, together with the interest thereon at the rate of five per centum per annum from the date of the last unattached coupon, and for each ten shares of stock set opposite their respective names, and will respectively pay their proportionate amount of overdue interest, if any, that may be due upon said loan after crediting the amount paid as aforesaid upon said coupons.

“Each Underwriter agrees that the Trust Company shall have the right to reduce the subscription of any Underwriter, and to make allotment in any case of less than the number of bonds subscribed for. In the event that a less number of bonds than is subscribed for shall be allotted in any case, the Underwriter or Underwriters to whom such less number of bonds may be so allotted agrees that he or they will take and pay for such less number of bonds at the same price per bond, and upon the same terms of payment as those mentioned above.

“In case of the failure of the underwriters, or any of them, to take and pay for the said bonds at the times and as provided in this agreement, the holder of said note of said Sedalia Electric & Railway Company may, without further demand or notice, sell, assign or deliver the whole or any part of said securities not so taken and paid for, at any brokers' board in the City of New York or elsewhere, or at public or private sale, at their option, at any time thereafter, without advertisement ⁵⁶⁴ or notice, and the Trust Company shall have the right to become purchasers thereof at such sale or sales, freed and discharged from any equity of redemption; and the Underwriters severally agree that all interest and legal or other costs, charges or expenses may be deducted from the proceeds of such sale, and the residue applied on the liability or indebtedness of such defaulting Underwriter under said note and this agreement; the overplus, if any, to be returned to the Company, and if there shall be any deficiency, the several Underwriters hereby promise to pay the same so far as it may arise under their own subscriptions or default, and not otherwise.

“The Underwriters each further agree that the Bankers shall have the right to purchase from or through the Trust Company, at any time on or before September 1, 1899, all or any part of the bonds for which the Underwriters have subscribed, at the price of not less than seven hundred and fifty dollars and accrued interest per bond, and each ten shares of stock, but in such event the Trust Company shall apply seven hundred and fifty dollars and accrued interest per bond for the bonds and stock so sold, to the payment of the loan mentioned herein, and in the event that the Bankers shall purchase all of the said bonds and stock hereby allotted to the said Underwriters under the terms of this agreement, then and in that event the Underwriters are hereby released from all further liability in the premises, and the Trust Company hereby agrees to notify them of such release.

“The Trust Company agrees that upon payment at any time after September 1, 1899, and on or before October 1, 1899, of said sum of seven hundred and fifty dollars per bond and the accrued interest thereon hereunder, it will deliver or cause to be delivered to the person entitled thereto respectively the number of said bonds and the number of said shares of stock now in its possession, for which the Underwriters have respectively ⁵⁶⁵ subscribed, or which may have been allotted respectively hereunder, less their several respective proportions of any bonds and stock that may have heretofore been purchased by the Bankers, as hereinbefore provided.

“It is understood and agreed that each Underwriter shall be liable for and upon his own subscription or default, and not for or upon the subscription or default of any of the others.

“In Witness Whereof, The Trust Company has caused this agreement to be subscribed by its President, and its corporate seal to be hereunto affixed, and the Underwriters and said Stewart & Company have hereunto affixed their names, this first day of November, 1898.”

Following this, the record abounds with a correspondence, curt and acrid on one side and appealing on the other, between Stewart and respondent, the purport of which was that respondent was from time to time extending the time for Stewart's compliance with the agreement to either sell the bonds pledged to the appellant trust company and take up its note, and thus redeem the stock or procure other underwriters for the sixty bonds in question, and take up re-

spondent's underwriting agreement, and return the same to him, and various excuses of Stewart for not doing so, and various plans suggested whereby Stewart hoped to carry his deal and release his father in law.

For some reason appellant did not present the railway company bonds and stock to respondent between September 1, 1899, and October 1, 1899, and demand payment therefor. On the other hand, it sold its collateral, including said stock and bonds, under the terms of the pledge, and the other underwriters having complied with their agreement and the note being reduced by such compliance and by the sale of said collateral, it was finally merged into the aforesaid judgment in the federal court, and this suit was instituted.

⁵⁰⁶ The record shows that respondent treated the stock in his hands as a pledge, and refused to act as a stockholder at any time. A certificate of stock representing the shares held by him was issued directly in his name in December, 1898, and stood in that form. The fourteen hundred shares of stock pledged to appellant trust company were transferred on the book of the railway company to appellant, and stood in its name. Though respondent claimed he was released on the underwriters' agreement by the failure of appellant to present the bonds between the dates provided for, yet he continued to retain the stock. The uncontroverted evidence shows, however, that appellant did not agree to his contention that he was released, but on the other hand asserted his liability under the underwriters' agreement, and threatened suit thereon, and this was respondent's excuse for retaining the stock in pledge.

The record shows that receivers were appointed by the federal court, and the underlying mortgages upon the assets and properties of the two constituent companies consolidated into the railway company were foreclosed and the property passed to strangers. Thus the stock and bonds of the railway company became as waste paper, and Stewart was declared a bankrupt.

The trial court found for the defendant on two grounds: "First, because the plaintiff, when it contracted this liability with the Sedalia company, knew exactly the condition of the stock. It advanced nothing upon the credit of that stock, and it was endeavoring to place this watered stock upon the community in its underwriting agreement. Second, I am clearly of the opinion," says the trial judge, "that the contract that

was entered into by Mr. McMillan with Stanley Stewart constituted a pledge of stock, and although it contains what may properly be termed a clause of forfeiture in case the debt is not paid, courts have uniformly held, from the Roman law down to date, that such clause as that will [not?] be enforced."

⁵⁶⁷ 1. The trial judge found the stock to be what is known as "watered stock." That it was such, and issued without value received, is beyond question on the facts disclosed by this record. That corporations created to be the owners of public utilities should be born into a sham and crippled life, and that there seems to be a call for more adequate safeguards against the itching temptation to circumvent our corporation laws by falsehood, whereby the ancient plan for making gain by "watering stock," conceived by the shrewd old patriarch, Jacob, in dealing with Laban (Genesis, xxx: 30 et seq., q. v.), is parodied and brought to blush, may concern the legislative branch of the government, but cannot be remedied by the courts except in sporadic cases, where some relief may be administered if the facts allow.

Nevertheless the fact that the stock was watered is by no means decisive of the case; for in an action at law tried to the court as a jury, the finding of the trial court on the facts is as binding on us as the verdict of a jury. With the weight of evidence we have nothing to do, and if there be substantial evidence sustaining a finding, that finding will not be meddled with on appeal: *Butler Co. v. Boatmen's Bank*, 143 Mo. 13, 44 S. W. 1047; *Comer v. Statham*, 173 Mo. 246, 72 S. W. 1074.

So, too, it is good law that underlying the trust-fund theory and the true value theory is the proposition that creditors have the right to assume that stock has been fully paid in money or money's worth as set forth solemnly in the articles of association of a corporation, and to extend credit on the faith of such assumption, but because of this underlying proposition it follows that if a creditor of an insolvent corporation did not extend credit on the faith of shareholders having paid their stock subscriptions in money or money's worth, but, to the contrary, knew at the time of the creation of the corporate debt that such stock was paid for in simulated values, he is not entitled to the remedy here ⁵⁶⁸ sought: *Berry v. Rood*, 168 Mo. 333, 67 S. W. 444, and cases cited; *Woolfolk v. January*, 131 Mo. 637, 33 S. W. 432; 1 Cook on Corpora-

tions, 5th ed., p. 135; and see *State Trust Co. v. Turner*, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136, where the authorities are collected and distinguished and an elegant and exhaustive consideration is given of the doctrine here invoked.

Applying the foregoing propositions of law to the facts of this case, we are of the opinion that even if respondent was held to be the actual owner of the stock in question, yet there is substantial evidence upon which the court below might well base its finding to the effect that appellant extended no credit to the railway company on the faith of its stock being full paid in money or money's worth. To the contrary, the proof tended to show that appellant knew the stock had been paid for in chips and whetstones, and, when issued, represented only, what its president termed, a "sentimental value." Appellant's president investigated this scheme when it involved a purchase of the bonds and the stock. It was laid before him anew by one Birdseye, an attorney for Stewart. By a letter in evidence he certified in substance that he had investigated the plan blazoned forth in the prospectus. Now, turning to the prospectus, it flew a danger signal in that it proposed to sell a \$1,000 five per cent gold mortgage bond for \$775 and to give ten shares of capital stock in a new-fledged corporation of the par value of \$1,000 as a bonus. On such facts, it would disturb, it seems to us, all normal methods of reasoning to conclude that a creditor who knew of such offer and whose experience in corporate stock and bond dealing enabled him to appreciate its significance, and who, as a part of the very inception of his debt, as here, undertook to finance such a company and to foist such a bond and stock sale upon a confiding public, extended credit on the faith of the fact that the corporate stock was fully paid in money or what might ⁵⁰⁹ be fairly considered as money's worth. One who knows cannot be said to be misled.

If, then, we should hold that respondent was the actual owner of the stock, we should be constrained to hold further that appellant is not entitled to the remedy it seeks in this case.

2. But was respondent a shareholder? The trial court found he was a pledgee of the stock and not a shareholder. Appellant insists that respondent was a shareholder and that the trial court erred in its construction of the agreement between respondent and Stewart. Light will be thrown upon this contention by recurring to fundamental legal principles.

What is a pledge? A pledge had been defined to "be a deposit of personal property as security, with implied power of sale upon default"; also as "a bailment of personal property as security for some debt or engagement"; also as "a deposit of personal property by way of security for the performance of another act"; and it has been said that "every contract by which the possession of personal property is transferred as security only is to be deemed a pledge." "The term 'collateral security' has in recent years come into general use to designate a pledge of negotiable paper, corporate stocks, or other incorporeal personalty, as distinguished from a pledge of corporeal chattels": Jones on Pledges, 2d ed., sec. 1.

Referring to the agreement between respondent and Stewart whereby the former came into possession of the stock certificate, and interpreting that agreement, wherein it may be dubious, in the light of the circumstances surrounding the parties, the contemporaneous construction put on the contract by the parties to it and the construction placed thereon by them continuously thereafter; remembering, too, that the record discloses that respondent did not want to invest in the ⁵⁷⁰ stock or bonds as an out and out purchaser; that he entered into the matter reluctantly and only to protect the affairs of his daughter's husband from an impending crash, we see no difficulty in agreeing with the learned trial judge that this was not a sale or a conditional sale of the stock with the mere right to repurchase in Stewart, but came clearly within the definition of a pledge.

Nor can the fact urged here, that the stock was placed in the name of respondent on the books of the corporation, and that a certificate was issued directly to him, be allowed to alone dominate the situation and characterize him as a shareholder: Union Savings Assn. v. Seligman, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630. If the fact that the stock stood in the name of respondent be allowed as conclusive on the question of ownership, it would lead to singular and embarrassing results; for the proposition would become a two-edged sword and cut both ways, since by the same token appellant became a stockholder when it had its pledged stock similarly transferred to it on the corporate books, and we would have the anomalous sight of one shareholder suing another on the theory that the stock was paid for in mere colorable values.

Nor do we place any significance upon the fact that respondent demanded and received the resignation of all of the

directors and officers of the corporation, for he never acted on this paper resignation, nor did he act in the capacity of a shareholder at any time, and the paper resignation of the directors and officers, in the light of the record, must be held merely as an auxiliary prod in his hand—a wherewithal to goad Stewart into performing the principal obligation wherein respondent had loaned his credit and wherein he held the stock as security to indemnify him against loss by that loan of credit.

The clause in the agreement between respondent and Stewart to the effect that after ninety days, if Stewart ⁵⁷¹ did not relieve him from responsibility under the underwriting, the stock was to become respondent's, is insisted on as transferring title to respondent. But that clause, in our opinion, should be considered in the light of a forfeiture, which would not *ex vi termini* constitute respondent the owner of the stock. This contract was made in New York, the parties resided in New York, and the stock was pledged and held there. In this condition of things respondent introduced in evidence two decisions of the appellate courts of that state (*Stoker v. Cogswell*, 25 How. Pr. 267; *Markham v. Jaudon*, 41 N. Y. 235), construing similar contracts of pledging to not vest the stock absolutely in the pledgee on default, but requiring at his hands a sale by judicial process or upon giving notice in order to cut off the claims of the pledgor in the stock. So that, if the *lex loci contractus* is to be read into the agreement, the matter is concluded by these decisions.

By section 1324 of the Revised Statutes of 1899, it is provided as follows:

“No person holding stock in the corporation, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder in such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as stockholder accordingly. And the estate and funds in the hands of such executors, administrators, guardians or trustees shall be liable in like manner and to the same extent as the testator or intestate or the ward or person interested in such trust fund would have been if he had been living and competent to act and hold the same stock in his own name.”

If the above statute is to be given effect and we are to hold, as we do, that the contract in question is that of a pledge,

the question in hand is set at rest. For this statute was construed in *Union Sav. Assn. v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630, by the supreme court of the United States in *Burgess* ⁵⁷² v. *Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10, 27 L. ed. 359, and by the appellate courts of the states from which it was borrowed (*Matthews v. Albert*, 24 Md. 527; and *McMahon v. Macy*, 51 N. Y. 155), to have the effect of denying the remedy sought in this suit, under the facts disclosed by this record.

The instructions given on both sides indicate that the trial court entertained a correct view of the principles of law applicable to the facts proved, and we are of opinion that no error exists, and therefore affirm the judgment.

All concur, except Marshall, J., not sitting.

The Issuance of the Stock of a Corporation for a wholly inadequate consideration is as much a fraud upon its creditors as though the company had disposed of any other debt due it for a wholly inadequate consideration, and a fraudulent holder of stock is liable to the creditors for its par value, less what he has paid for it to the corporation: *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427, 23 Am. St. Rep. 417. When stock is issued for property taken at an overvaluation, it is competent to compel the stockholders to respond for the difference between the actual value of the property and the par value of the stock: *Macbeth v. Banfield*, 45 Or. 553, 106 Am. St. Rep. 670, and see the cases cited in the cross-reference note thereto.

WASH v. WASH.

[189 Mo. 352, 87 S. W. 993.]

ESTATES OF DECEDENTS.—A widow's right to elect to take one-half of her childless husband's estate subject to debts is purely statutory, and cannot be upheld unless she complies with all the provisions of the statute. (p. 359.)

PRINCIPAL AND AGENT.—Death Revokes All Powers of Attorney granted by the decedent, and an attorney cannot, after the death of his client or principal, complete for her an act for her benefit and which she undertook and intended to do in her lifetime. (p. 359.)

ESTATES OF DECEDENTS—Widow's Election, When Incomplete.—Though a widow executes and acknowledges in the form prescribed by statute and files in the proper office her election to take one-half of her childless husband's estate in lieu of dower, yet if such election is not filed in the recorder's office in her lifetime, it is wholly inoperative, and cannot become operative by being filed by her attorney after her death. (p. 359.)

Watson & Holmes and J. B. Harrison, for the appellants.

Charles E. Morrow, for the respondent.

³⁵⁴ GANTT, J. This is a suit in partition commenced in the circuit court of Phelps county on the 26th of April, 1901. The defendants were all served, either by publication or writs of summons. The cause was afterward sent on change of venue to Greene county. In the latter court a guardian ad litem was appointed for the minor defendants.

There is no controversy whatever as to the proof of the heirs of Thomas A. Wash, deceased. It is conceded by both parties that they are correctly stated in the petition.

It is alleged that Thomas A. Wash died intestate in Phelps county on the fifteenth day of May, 1899, owning ³⁵⁵ the land described therein, leaving S. Caroline Wash as his widow, and the other plaintiffs and defendants are his brothers and sisters and their descendants, except the defendant Pierre Watson and the Harrison Machine Works. Thomas A. Wash had no children. He married his brother's widow, and the defendant, Eldorado Wash, was both his niece and stepdaughter, being the daughter of S. Caroline Wash by her former husband, William Wash, his brother.

The petition alleged that S. Caroline Wash did not elect to take one-half of the lands whereof her husband died seised in lieu of dower, as she might have done, and on the 23d of February, 1900, she died leaving a will, set out in the petition, whereby she devised all the land described in the petition to her daughter, Eldorado Wash and Pierre Watson. It was also alleged in the petition that suit had been instituted in the circuit court of Phelps county, by some of her heirs to contest said will, and that there had been a decision in said court sustaining the same, and an appeal had been taken to the supreme court and the same was pending therein. That since the death of said S. Caroline Wash, said Pierre Watson had executed a deed of trust of said land to G. A. Miller, trustee, for the Harrison Machine Works, to secure a note therein described; that on the 25th of September, 1900, Pierre Watson made a quitclaim deed to all the said lands

to Eldorado Wash; that as a matter of fact said S. Caroline Wash only had a dower interest in said lands, and she could will no interest therein to Eldorado Wash and Pierre Watson, and for that reason, Pierre Watson and the Harrison Machine Works had no interest in said land, and Eldorado Wash had only an undivided one-eighteenth, which she inherited from her uncle, the said Thomas A. Wash. There was an allegation that the land could not be divided in kind, and there was a prayer for judgment, for rents and profits, and that they be decreed a ³⁵⁶ lien and charge on the interest of Eldorado Wash and for partition and sale.

The answer of Eldorado Wash was a general denial, but admitted that Thomas A. Wash died intestate seised of the land described in the petition, and that S. Caroline Wash was his widow, and averred that S. Caroline Wash duly made an election to take one-half of the lands of Thomas A. Wash, subject to debts, and that she died February 23, 1900, and left the will set out in the petition, and that a suit was pending to contest the same in the supreme court; admitted a deed from Pierre Watson to herself, and alleged that she was the owner of one undivided half of said lands by virtue of the election of said S. Caroline Wash, and the will of said S. Caroline Wash, and the deed from Pierre Watson to herself. She alleged further that the debts of the estate had not been paid and for that reason partition could not be had; she admitted further that she was in possession of the lands and running the same, but was accounting to the probate court for the rent, and denies that she had converted the same.

The only controversy in this case arises over the sufficiency of the election made by Mrs. S. Caroline Wash as the widow of T. A. Wash. The plaintiffs offered a paper in evidence which was executed by said S. Caroline Wash on the 17th of August, 1899, and filed in the office of the probate judge or clerk of Phelps county, on the 28th of August, 1899. It is in words and figures as follows:

"Now this day comes Carrie Wash, widow of the said T. A. Wash, deceased, and shows to the court that said T. A. Wash died without any child or other descendants in being capable of inheriting, and that she elects to take as dower in the estate of T. A. Wash, and in lieu of dower

under the provisions of sections 4513, 4515 and 4516 of the Revised Statutes of Missouri of 1889, all the real and personal estate which come to her husband in right of her marriage with him, as also all ³⁵⁷ the personal property of said T. A. Wash which come to his possession with her written assent, and which remained undisposed of at the time of the death of said T. A. Wash; and said S. Caroline Wash elects to take in addition to the above and subject to the payments of the debts of said T. A. Wash, one-half of the real estate and personal estate belonging to the said T. A. Wash at the time of his death, all the above to be her absolute property. Witness my hand this 17th day of August, 1899. S. C. WASH.

“On this 17th day of August, 1899, personally appeared before me Carrie Wash, to me known to be the person described in, and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

CHARLES ROSTER,
“Justice of the Peace.”

On the back of above paper is the following:

“Estate of T. A. Wash, deceased, election of property by widow, Carrie Wash. Filed August 28, 1899.

“ALBERT NEUMAN,
“Judge of Probate.”

The plaintiffs next offered in evidence a certified copy of the said paper certified by the judge of the probate court to be a true copy of the same as it appeared of record in his office, which said certified copy of said paper, together with the certificate thereon, was filed for record in the office of the recorder of deeds of Phelps county, Missouri, on the fifteenth day of August, 1900. The evidence tended further to show that Thomas A. Wash died May 15, 1899; that letters of administration were granted on his estate July 10, 1899, and notice of the letters was published within thirty days thereafter. The original election itself was never filed in the recorder's office. This was practically all the evidence offered by the plaintiffs.

³⁵⁸ The defendants offered in evidence the testimony of J. A. Watson, Esq., who testified that he prepared the election of Mrs. Wash, and represented her during the

administration of the Wash estate. After her election was executed he took it to Rolla and filed it with the probate judge; it was his recollection that he told Judge Neuman to record it, and make out a copy or something, that it had to be filed in the recorder's office, and left it at that time and paid no more attention to it until after the death of Mrs. Wash, when he went to Judge Neuman and inquired if he had filed it with the recorder as he had directed, and found that it was still in Neuman's office and had not been filed with the recorder; that he then had a copy of the election made and then filed it himself, or had Judge Neuman do it. He thought the original paper was misplaced at the time he went to see about it after Mrs. Wash's death, but is not sure about it; she was dead at the time he had the certified copy filed in the recorder's office.

The question arises upon the foregoing state of facts, whether Mrs. Wash's election was complete so as to vest in her an undivided one-half of the lands of which her husband Thomas Wash died seised, he having left no children. Section 2943 of the Revised Statutes of 1899 provides: "Such election shall be made by declaration, in writing, acknowledged by some officer authorized to take acknowledgments of deeds, and filed in the office of the clerk of the court in which letters testamentary or of administration shall have been granted within twelve months after the grant of the same; and such declaration shall also be filed in the recorder's office in the county in which letters testamentary or of administration were granted, within fifteen months after the grant of same, otherwise she shall be endowed under the provisions of sections 2933, 2935 and 2936." This section of the statute was construed by this court in *Allen v. Harnett*, 116 Mo. 278, 22 S. W. 717, wherein it appeared that Mrs. Harnett had duly executed her election ³⁵⁹ to take one-half of her husband's estate subject to debts, and acknowledged the same before a notary public and on the day that the paper was written, signed and acknowledged, the notary public, who was also the attorney of the estate of her husband, placed the same in an envelope and directed it to the judge of the probate court, and prepaid the postage thereon, and deposited it in the mail. After the time for making her

election had elapsed she discovered that it had never been received by the probate judge, and executed a new election duly acknowledged, and filed it in the office of the probate court. In a contest between her and the heirs of her husband, it was held that her failure to file her first acknowledgment in the probate court within the time prescribed in said section was fatal, and she could only be endowed under the other sections of the statutes. It was said by Burgess, J.: "This right is purely statutory. It did not exist at common law. Then to entitle the widow to its benefits she must bring herself within its provisions. Equity can afford her no relief. Admitting all the evidence introduced in her behalf to be true, then she did not comply with the statute. That she intended to do so there can be no question. It devolved upon her to see that her election was not only duly and timely executed, but that it was also filed in the office of the judge of the probate court of St. Charles county within twelve months after the granting of letters of administration on her deceased husband's estate. It will not do to depend upon the mails under such circumstances, and run the risk of papers of so much importance being miscarried and never reaching their destination." That decision was in line with various other previous decisions of this court as to the execution of statutory powers.

In this case, as in that, it can be said that it was clearly the intention of Mrs. S. Caroline Wash to make her election, and to take one undivided half of her husband's ³⁰⁰ estate, subject to the payment of his debts, but she did not comply with the statute and file that declaration of election in the recorder's office in the county in which the letters of administration had been granted within fifteen months after the grant of the same. And we can see no authority for dispensing with any part of the statutory requirements. It is true that after her death, her attorney filed a certified copy of the election in the recorder's office, but it is too plain for discussion that when Mrs. Wash died her death revoked all powers of attorney which she had created in her lifetime, and that her attorney, after her death, could not complete her election by filing the copy of her election in the probate office in the recorder's office, nor would his filing of the original election have mended the matter and secured to her devisees

the benefit of the statute which she had lost by her failure to comply with the requirements in her lifetime.

This exact point was ruled in *Church v. McLaren*, 85 Wis. 122, 55 N. W. 152, wherein the court said: "The right to make such election or renunciation is purely a personal privilege of the widow, and is terminated by her death. It is not a property right which survives to her representatives or heirs. To be operative, it must be complete within her lifetime, and by the statute it is required to be, by notice filed in the court within one year after the death of her husband; 'and upon filing such notice, she shall be entitled,' etc., as in the statute stated. Until filed in court she may reconsider it, and claim under the will. It is the giving of the notice, by filing it, which is made by the statute the operative act of election or renunciation, and, where a right grows out of an election, it cannot arise or come into existence until the election is complete. It is well settled that the election in such case cannot be made by anyone in her name or otherwise, after her death: *Schouler on Domestic Relations*, sec. 206; *Sherman v. Newton*, 6 Gray, 307; *Atherton v. Corliss*, 101 Mass. 44, 45; *Crozier's Appeal*, 90 ³⁶¹ Pa. St. 384, 35 Am. Rep. 666; *Jackson's Appeal*, 126 Pa. St. 105, 107, 108, 17 Atl. 535; *Welch v. Anderson*, 28 Mo. 293.

"It does not appear in what way the election executed by the widow came to the hands of the executor, but presumably with her other papers. Had she, however, delivered it to him, or to any other person, with instructions to file it in the proper court, this would have created a mere agency which would have been certainly terminated by her death. For these reasons the claims of the executor of Fanny Gunyon cannot be sustained, and the judgment of the circuit court in his favor is erroneous and must be reversed."

And the same doctrine is stated in volume 5 of *American and English Encyclopedia of Law*, first edition, 918.

In view of the fact that section 2939 of the Revised Statutes of 1899 makes a marked change in the devolution of titles to real estate from that prescribed in our laws of descent and distribution, it can readily be seen that it is a matter of no ordinary importance to heirs and to those dealing in real estate that the evidence of such election should be kept as a public record, open to

the world, and the burden cast upon the widow desiring to make such election is so slight that the most indigent can avail herself of it and the provision as to recording so plain and simple that one failing to comply with it must suffer whatever loss results from her negligence in so doing. In our opinion the plain letter of the statute must control and we are powerless to add anything to it.

It results that in view of the previous decisions of this court it must be held that Mrs. Wash did not make her election in the manner and within the time prescribed by the law, and therefore, she did not acquire an undivided one-half of the lands in suit, and the judgment of the circuit court must be and is affirmed.

All concur.

The Statutory Right of a Widow to Elect between her right of dower and her rights under her husband's will, is usually regarded as a strictly personal right which cannot be exercised by another person on her behalf. This question has arisen in a number of instances in the case of insane widows: See *Van Steenwyck v. Washburn*, 59 Wis. 483, 48 Am. Rep. 532; *Crenshaw v. Carpenter*, 69 Ala. 572, 44 Am. Rep. 539; *Kennedy v. Johnston*, 65 Pa. St. 451, 3 Am. Rep. 650; *Wright v. West*, 2 Lea, 78, 31 Am. Rep. 78. Although she was prevented by insanity from making an election in her lifetime, it has been held that the right cannot be exercised after her death by her representatives: *Crozier's Appeal*, 90 Pa. St. 384, 35 Am. Rep. 666.

REYNOLDS v. TRANSIT COMPANY.

[189 Mo. 408, 88 S. W. 50.]

NEGLIGENCE—Burden of Proof.—If it appears that the plaintiff while riding in one of the defendant's cars, which was struck by another of defendant's cars, was injured, the burden of accounting for the collision must be assumed by the defendant. (p. 363.)

STREET RAILWAYS, Passengers, Who Presumed to be and to Have the Rights of—Payment of Fare.—If it appears that the plaintiff boarded one of the defendant's cars, and rode therein to the place where it collided with another of the defendant's cars to the plaintiff's injury, the presumption arises, though the payment of fare is not proved, that he was there under an implied contract creating between him and the railway company the relation of passenger and carrier. (p. 363.)

APPEAL AND ERROR—Instructions to the Jury, Errors in, When Must be Disregarded.—By the statutes of Missouri, an error not affecting the merits must not be regarded on appeal. Hence, a judg-

ment will not be reversed because an instruction was broader than it should have been, if the uncontradicted evidence shows a right of recovery on the part of the plaintiff. (p. 364.)

DAMAGES in Personal Injury Cases—Instruction, When not Prejudicial.—An instruction in a suit for personal injuries that the plaintiff may be allowed compensation for time lost and for diminished earning capacity, and given such sum as the jury may believe to be fair and just for any loss which he has sustained in the past or may sustain in his future condition by reason of such diminished earning capacity as may be occasioned by his injury, is not to be construed as meaning that he is to be compensated for both loss of time and wages in the same past and future period. (pp. 364, 365.)

“MAY,” Use of in Instruction.—An instruction that the jury may allow the plaintiff for the diminished earning capacity that may be occasioned by his injury will not be held prejudicial or erroneous, on the ground that it authorized the jury to allow for damages which it is not reasonably certain will result from the injury. Though a safer word might have been used, the instruction will not be held erroneous, where the context, in the light of the facts of the case to which the instruction applies, shows that it was used to import reasonable probability or reasonable certainty. (p. 366.)

JURY TRIAL—Damages, When Excessive.—An award by the jury of twenty-three thousand four hundred dollars as damages for personal injury was held to be excessive and reduced by the court to fifteen thousand dollars, where the plaintiff's testimony was to the effect that he was at the time of the injury forty-two years of age, strong and healthy, that he was thrown on his back, receiving a painful injury, and has never been able to stand or walk since, and has lost forty or fifty pounds, and is required constantly to take purgatives, and has diabetes and paralysis of both legs and manifestations of progressive nervous decay, and is a helpless cripple with little hope of improvement; while the expert testimony on the part of the defendant was to the effect that his injuries were less severe than represented, the condition of his legs due to hysterical anesthesia, and that there was no evidence of diabetes. (pp. 366, 367.)

Boyle, Priest & Lehmann, George W. Easley and Edward T. Miller, for the appellant.

John W. Booth, Oscar E. Meyersieck, Richard F. Ralph, Thomas T. Fauntleroy and Shepard Barclay, for the respondent.

416 VALLIANT, J. Plaintiff obtained a judgment for twenty-three thousand four hundred dollars damages for injuries to his person received in a collision of two street-cars of defendant. The defendant appeals.

The plaintiff was a passenger on one of defendant's street-cars on what is called the Bellefontaine line, and as the car was crossing another track of defendant, called the Fourth street line, a car on the last-named track, aiming for the same crossing, struck the car in which plaintiff was riding, in con-

sequence of which the plaintiff was thrown out of the seat and received severe injuries. The suit was begun in St. Louis, but taken by change of venue to Franklin county, where it has been twice tried. On the first trial there was a verdict for the plaintiff for thirty-five thousand dollars, but the court sustained defendant's motion for a new trial, and the cause was tried again. On the second trial the verdict was for twenty-three thousand four hundred dollars, and the court overruled defendant's motion for a new trial, whereupon the defendant took this appeal.

1. It appears from the respondent's abstract that when the appellant presented its bill of exceptions to the trial judge for his signing the plaintiff insisted that the argument of Mr. Hocker, the defendant's attorney, to the jury should be inserted in the bill of exceptions, and for that purpose presented to the court the stenographer's report of that argument, but the court refused the plaintiff's request and signed the bill as it was offered by the defendant. Then the plaintiff excepted to that ruling, and the court thereupon signed a bill of exceptions for the plaintiff which contained the argument,⁴¹⁷ and respondent now asks that his bill of exceptions be taken as a part of the record in the case. The significance of this request is that in the argument of the defendant's counsel he frankly admitted to the jury that the accident was the result of defendant's negligence, and that the only point on which the plaintiff and defendant could not agree was the amount of damages the plaintiff should have to compensate him for his injury—that he was injured to some extent, but not to the extent claimed by him.

Respondent contends, on the authority of what is said in *Darrier v. Darrier*, 58 Mo. 222, that this court should cause the defendant's bill of exceptions to be amended or corrected, by inserting the contents of the plaintiff's bill into it, or consider it done without going through the formality of doing it or requiring it to be done. We do not understand the case referred to as being a precedent for amending appellant's bill of exceptions in the manner proposed. But it would not materially alter the case if the bill of exceptions contained the admission referred to, because the admission was nothing more than what the uncontradicted evidence showed was the fact, and the counsel in frankly making the statement was not only discharging his duty to the court, but also discharg-

ing his full duty to his client, by presenting the case to the jury in the very best light in which it could be presented.

The evidence showed that the plaintiff was a passenger in one of defendant's cars which was struck by another of defendant's cars, and he was thereby injured; it was therefore in legal contemplation the defendant's own hand that struck the plaintiff. When those facts were shown a *prima facie* case was made for the plaintiff, and the burden of accounting for the collision was shifted to the defendant, but defendant offered no evidence on that point. The only evidence offered⁴¹⁸ by defendant was that of experts relating to the degree of the plaintiff's injuries.

2. The petition alleges that the defendant received the plaintiff on its car as a passenger, and for a valuable consideration paid by plaintiff undertook to carry him safely to his point of destination. In the instructions given for plaintiff the jury are told that if they should find certain facts, among them that "the defendant received the plaintiff as a passenger to be carried for hire," they should find for the plaintiff. There was no evidence that plaintiff paid any fare, or that fare was demanded. The submitting of that question to the jury is assigned for error. The argument in support of the assignment is that the relation of passenger and carrier is created only by contract, and that under the general denial the burden was on the plaintiff to prove the contract alleged, and failing to offer any proof on that point there was nothing to go to the jury—citing in support of that proposition, *Schepers v. Union Depot R. R. Co.*, 126 Mo. 665, 29 S. W. 712; *Schaefer v. St. Louis etc. Ry.*, 128 Mo. 64, 30 S. W. 331.

Those cases do hold that the relation of passenger and carrier grows only out of contract, but they also hold that the contract is either express or implied. The evidence in this case shows that the plaintiff boarded one of defendant's street-cars at Lucas avenue, and was carried in it as far as the crossing of Park avenue and Gratton street, where the accident occurred. The facts that he was received in the vehicle of a public carrier and was being carried in the manner of a passenger, and nothing else appearing, were sufficient for the inference that he was there under the implied contract that created the relation between him and the defendant of passenger and carrier. There was no error in submitting that question to the jury.

3. The petition alleges that while the plaintiff was in a car of the defendant, its servants so carelessly ⁴¹⁹ and negligently managed another one of its cars by a "negligent and violent rate of speed" that it was brought into violent collision with the one in which plaintiff was being carried, and the accident resulted therefrom. In an instruction for the plaintiff the jury were told that if they should find certain facts, among them that the defendant "so negligently ran and operated said cars or either of them" as to cause the collision, the verdict should be for the plaintiff. It is assigned for error that the words in quotation rendered the instruction erroneous, as authorizing a recovery on the finding of an act of negligence different from that stated in the petition, that is to say, on the finding that the car in which plaintiff was riding was negligently managed.

If the instruction was broader than it should have been the error does not reach the merits of the case. According to the uncontradicted evidence the accident was caused by the negligence of defendant's servants, either those on the Fourth street car which crushed into the Bellefontaine car, or those on the latter in not avoiding the collision. Error not affecting the merits of the action is not to be regarded on appeal: Rev. Stats. 1899, sec. 865.

4. Appellant complains of the instruction given for plaintiff on the measure of damages. The testimony for the plaintiff tended to show that his injuries were such as caused great suffering, physical and mental; that they disabled him from pursuing his avocation, and they were likely to be permanent. The instruction complained of is as follows: "If, under the law and evidence, you find the issues in this cause for the plaintiff, the damages which you may award him should be compensatory only, and in estimating such damages you will take into consideration and allow him for expenses for doctor's bill incurred, if any, in treating his injuries. Also, compensation ⁴²⁰ for the time lost, if any, during his illness occasioned by his injury. And while the evidence may not prove any specific sum in dollars and cents that plaintiff may have been damaged by reason of physical pain and mental anguish, yet you may allow him what you believe to be just and fair to compensate him for such sufferings, if any. You will also take into consideration, in estimating his damages, his diminished capacity for earning money, if you so believe from the evidence, and on account thereof make him

such allowance as you may believe to be fair and just for any loss that you may believe from the evidence he has sustained in the past by reason thereof, and for any loss you may believe from the evidence he may sustain in his future earnings by reason of such diminished earning capacity as may be occasioned by his injury."

The criticism of plaintiff's instruction is that it authorizes a recovery for loss of time and also for diminished earning capacity during the same period and for loss of what he may sustain in the future, with emphasis on the word "may."

The instruction does direct the jury to consider the plaintiff's loss of time and diminution of his earning capacity past and future, and possibly one reading that instruction might construe it to mean that plaintiff was to be compensated for time lost in the past and wages lost in the same past period by reason of diminished earning capacity, but that would be a strained construction and an unreasonable one. The value of his lost time could be estimated only by the value of his lost wages. During some of the time he might be entirely incapacitated, and in some his earning capacity be only diminished. In view of this criticism we see how the instruction might have been worded so as to render it more accurate, but that may be said of almost every instruction when viewed under the microscope.

The learned counsel for appellant do not attach ⁴²¹ much importance to that point, but do attach importance to another point in the instruction; they say: "The vital error in this instruction, however, is that it directs a recovery for loss of future earnings that the plaintiff may sustain by reason of diminished earning capacity that may be occasioned by his injury." The counsel give to the word "may" in that connection the meaning of the term, "possibly might," and they say "this instruction violates the rule that future damages for injuries, pain or suffering must be confined to such as the evidence renders it reasonably certain will result from the injury." That is the correct rule as shown by the numerous cases cited in its support, among which are: *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Bradley v. Chicago etc. Ry. Co.*, 138 Mo. 301, 39 S. W. 763; *Chilton v. St. Joseph*, 143 Mo. 192, 44 S. W. 762.

The word "may" used as an auxiliary verb has a wide scope of meaning, into which the idea of mere possibility enters, but it also comprehends the idea of probability and also

the thought of what is with more or less certainty to be expected, and whether it is to carry the one thought or the other often depends on the context.

The word "may" is used in this instruction nine times; if we should erase it whenever it occurs and write in its place "possibly might," we would convert it into an instruction conveying a very different meaning from that which a casual reading of it now conveys.

This instruction is an almost literal copy of one approved by this court in *Rodney v. St. Louis etc. R. R. Co.*, 127 Mo. 676, 28 S. W. 887, 30 S. W. 150, where the word "may" is used in the same sense.

The term "may sustain in the future" in reference to the same subject has been approved in other cases by this court: *O'Connell v. St. Louis etc. Ry. Co.*, 106 Mo. 484, 17 S. W. 494; *Duerst v. St. Louis Stamping Co.*, 163 Mo. 617, 63 S. W. 827.

A safer word than "may" could be used to express the idea of probability or reasonable certainty, but we will not hold an instruction erroneous where the context ⁴²² in the light of the facts of the case to which the instruction is applied shows that it is used to imply reasonable probability or reasonable certainty.

5. Lastly it is insisted that the damages are excessive. The testimony for the plaintiff tended to show that at the time of the accident he was forty-two years old, in the prime of life, strong and healthy, weighing one hundred and ninety pounds. By the collision he was thrown to the other side of the car in which he was seated, his back striking the edge of a seat on that side, inflicting a painful injury, and he was carried home in an ambulance; that he has never been able to stand or walk since that time; he has lost forty or fifty pounds of weight; is required constantly to take purgatives to move his bowels; he has diabetes and paralysis of both his legs; and he has manifestation of progressive nervous decay; he is a helpless cripple, and there is little hope of any improvement.

The expert testimony on the part of the defendant tended to show that the plaintiff's injuries were not as severe as he represented them to be; that the condition of his legs was due to hysterical anasthesia, which is a disturbance in the function of the central nervous system, and such cases usually get well. When recovery comes it is spontaneous. A physician who examined the plaintiff by order of the court found no evidence of diabetes nor ankylosis. Another learned wit-

ness testified that traumatic neurosis was not a disease but was a condition. "The nervous system is in a bad condition; that is, does not act in a proper manner, and they are mentally disturbed more easily, and they are very miserable, irritable, little things worry them, and they may lose flesh or else they may become weak as far as their muscular system is concerned. . . . Under proper conditions they recover sometimes very promptly, sometimes with time. They may run for the course of a year or two. . . . They do not die of ⁴²³ traumatic neurosis. . . . It is called hysterical paralysis; it is not a paralysis based upon a defined lesion of the spinal cord. . . . The recovery of sensation may be rapid or it may be slow—it may be blood or it may be paralysis."

The award of the jury was twenty-three thousand four hundred dollars. That award in our opinion is excessive. We recognize the difficulty in laying down a rule for the measure of damages in such cases, and it is always with great hesitancy that we interfere with the verdict of a jury on this question, but we feel constrained to do so in this instance. In our opinion fifteen thousand dollars would be a fair compensation to the plaintiff for the injuries he has suffered. If, therefore, the plaintiff sees fit within ten days to remit eight thousand four hundred dollars of his award we will affirm the judgment; otherwise, the judgment will be reversed and the cause remanded for a new trial.

All concur, except Marshall, J., not sitting.

The Question of Who are Passengers and when they become such is discussed in general in the monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 75-104, and it is discussed with special reference to street railways in the recent monographic note to Duchemin v. Boston etc. Ry. Co., 104 Am. St. Rep. 584-589.

KESSNER v. PHILLIPS.

[189 Mo. 515, 88 S. W. 66.]

A SPENDTHRIFT TRUST is One created for the maintenance of the cestui que trust and to secure the fund against his improvidence. (pp. 372, 373.)

IN ORDER TO CREATE A SPENDTHRIFT TRUST These Requisites Must be Observed: 1. The gift to the donee must be of the income only; 2. The legal title must be vested in the trustee; 3. The trust must be an active one, not a mere dry trust which may be executed under the statute of frauds. (p. 373.)

SPENDTHRIFT TRUST, When not Created.—A conveyance of property by way of gift to a designated grantee on the condition that the property shall not be liable to any debts which he may contract within thirty years, and providing that he shall have no power to sell or encumber for the same period, and that if he should attempt to sell or encumber within that time, the title shall immediately vest in the grantors, does not create a spendthrift trust. (p. 374.)

CONVEYANCE—Invalid Condition.—To an absolute conveyance in fee a clause providing that the grantee shall not dispose of or mortgage the property is repugnant and void. (p. 375.)

CONVEYANCE.—Condition That the Land Conveyed Shall not be Subject to the Grantee's Debts is a restraint of alienation and void. (p. 375.)

CONVEYANCE—Alienation, Attempt to Restrain Power of for a Limited Period.—If a conveyance in fee contains a condition that the grantee shall not convey or encumber the property for thirty years, and if he attempts to do so, that it shall vest in the grantors, the condition is void. (p. 377.)

EVIDENCE Controlled by the Pleadings.—Where the pleadings in a case allege and admit that a judgment obtained therein is final, evidence is not admissible to show that it is not so because motions for a new trial and in arrest of judgment have been made and remain undisposed of. (p. 377.)

A SHERIFF'S DEED of Property Which is Part of a Homestead Need not State that the defendant was allowed to select the portion of the land which he would hold as his homestead, though such statement is required to appear in the return of the execution. (p. 379.)

PRACTICE—Law or Equity.—Where an answer sets up an equitable defense, but asks no affirmative equitable relief, the cause is one at law and not in equity. (p. 379.)

APPEAL AND ERROR—Waiver of Errors.—Where the court tries the case as one of equity when it is an action at law, but the defendant acquiesces therein and does not present any exceptions, he cannot assign the action of the trial court as error. (p. 379.)

A. N. Adams, John N. Southern and Scarritt, Griffith & Jones, for the appellants.

Paxton & Rose, for the respondents.

⁵¹⁸ MARSHALL, J. This is an action in ejectment, instituted on the 20th of September, 1899, to recover seventy acres of land in township 50, range 30, Jackson county, Missouri. The petition is in the usual form, and the ouster is laid as of September 20, 1899.

The action is against Phillips, the tenant in possession, and Joseph Lamertine Hudspeth, the owner.

The defendants answered jointly. The answer is a general denial, coupled with a special defense particularly set forth, the substance of which is, that the conveyance to the defendant Hudspeth of the land in controversy created a spendthrift trust, whereby said Hudspeth was prohibited from alienating the land, and ⁵¹⁹ whereby it was attempted to place the same beyond the reach of his creditors. The answer further sets up that in 1898 the plaintiff Kessner obtained a judgment for five thousand dollars against the defendant Hudspeth, under which the property in controversy was sold on execution and the plaintiffs became the purchasers thereof. And it is alleged that they thereby acquired no right, title or interest in the same. The reply admits the conveyance to Hudspeth, but denies that it created such a trust; admits the judgment aforesaid and the sale thereunder, and asserts that the plaintiffs obtained a good title to the property.

Upon the motion of the plaintiffs the case was transferred to the equity docket of the court, "for the reason that defendants have filed an answer setting up an equitable defense, and the case is now triable by this court." It does not appear from the abstract of the record that the defendant objected thereto or saved any exceptions to the ruling of the court.

The trial court entered judgment for the plaintiffs for possession, one cent damages, and twenty dollars monthly rents and profits. After proper steps the defendants appealed.

The case made is this: Robert N. Hudspeth, the uncle of the defendant Joseph Lamertine Hudspeth, was the owner of the property. On the 30th of March, 1871, he executed his will, by which he devised all of his property, including that in controversy, to his brothers and sister—that is, one undivided half to his brother Joel E. Hudspeth, and the other undivided half to his brothers George W. Hudspeth, Silas B. Hudspeth, and his sister Malinda P. Bell, share and share alike. Thereafter, in March, 1885, Robert N. Hudspeth died. And afterward, on June 15, 1885, his said brothers and his said sister made, executed and delivered to the defendant,

Joseph Lamertine Hudspeth, a deed to the property in question, being a part of the property devised to them, ⁵²⁰ and which deed recited that "in consideration of love and affection, and in pursuance to the verbal request of their brother, Robert N. Hudspeth, now deceased, whose heirs and devisees they are, under and by virtue of his last will and testament and upon the condition precedent as herein set out, and in consideration of the sum of one dollar to them paid by Joseph Lamertine Hudspeth, they have granted, bargained, sold and transferred, and do by these presents grant, bargain, sell and transfer unto the said Joseph Lamertine Hudspeth, upon the terms and conditions hereinafter set forth," certain property, amounting to one hundred twenty acres, and covering the seventy acres here in dispute. The deed contained the following further provisions: "This conveyance being made upon the express condition that the above-described real estate shall not be liable to any debts that the said Joseph Lamertine Hudspeth may now have, or that he may contract during the period of thirty years from the date hereof. And the said Joseph Lamertine Hudspeth shall have no right, power or authority to, in any manner sell, encumber or dispose of said real estate or any part thereof for the period of thirty years from the date hereof, except to dispose of the same by his last will and testament. After the expiration of said thirty years, as aforesaid, said real estate shall vest absolutely in the said Joseph Lamertine Hudspeth, free and clear of all the conditions herein named to use and enjoy and dispose of in any manner he may deem proper. The said Joseph Lamertine Hudspeth to have the use and enjoyment and the income therefrom from this date upon the terms and conditions above named. But should he sell, or attempt to sell or encumber, said premises at any time during the said thirty years, then, in that event, the title to the above-described premises shall immediately vest in the said first parties, their heirs or assigns."

The plaintiffs offered in evidence the sheriff's ⁵²¹ deed, under the judgment aforesaid. The defendants objected to the introduction of the deed upon two grounds, first, because the deed does not show, on its face, that the law in reference to the setting apart of a homestead had been complied with; and second, that the judgment under which execution was issued was not a final judgment, and therefore the clerk had no

right to issue the execution. The court overruled the objection, and the defendants saved exception.

The sheriff's deed showed that commissioners were appointed to set out the homestead of the defendant Hudspeth, and that they did set apart to him fifty acres of the tract as a homestead, and that the remaining seventy acres were sold to the plaintiffs.

The plaintiffs also offered in evidence the amended petition in the case wherein the judgment aforesaid was rendered, which showed that the plaintiff Kessner was the wife of Joseph W. Kessner, and that the defendant Hudspeth had willfully shot and killed him, for which she sued for five thousand dollars damages. The plaintiffs also showed the rental value of the land and then rested.

On their behalf the defendants offered in evidence a certified copy of the judgment aforesaid, which also contained a recital of the fact that the defendant had filed motions for new trial and in arrest of judgment.

The record did not show, affirmatively, that said motions had been overruled or acted upon. The plaintiffs objected to the introduction of the said certified copy of the judgment, on the ground that the defendants' answer admitted that the judgment was a final judgment, and further because the certified copy did not purport to be a copy of the whole record or proceedings in the case. The court sustained the objection, and excluded the record on the ground that the defendants' answer pleaded the judgment as a final judgment, and the plaintiffs' reply admitted the same. The defendants excepted to the ruling of the court.

The defendants then offered in evidence the will ⁵²² of Robert N. Hudspeth, which, so far as is material here, devised the property in controversy to the brothers and sister of the testator, absolutely, as stated. The defendants then called Edward P. Gates, one of the attesting witnesses to the will, and over the objection of the plaintiffs, the court permitted him to testify that at the time the testator executed the will, he apprehended some difficulty, which might result in his sudden death. But the witness testified that no such occurrence took place, and that the testator lived a number of years afterward. The defendants also called Mrs. Malinda Wood, nee Bell, the sister of the testator, and one of the grantors in the deed to the defendant Hudspeth, and over the objection of the plaintiffs, the court permitted her

to testify that she and her brothers executed the deed to the defendant Hudspeth in conformity to the verbal direction of the testator that they should convey the property to the defendant Hudspeth and should fix it so that it could not be taken for his debts for a period of thirty years, and so that he could not alienate it. She further testified that the defendant Hudspeth paid nothing for the land. This was all of the testimony in the case. As before stated, the trial court entered a judgment for the plaintiffs, and after proper steps the defendants appealed.

1. The crucial question in this case is, what interest defendant Hudspeth had in the land in controversy.

The defendants contend that Robert N. Hudspeth, by verbal directions to his brothers and sister, created a spendthrift trust for the defendant Hudspeth, and that said brothers and sister effectuated the trust by the execution of the deed to him, and that the proper construction of that deed is, that the land could neither be alienated by the defendant Hudspeth, or taken in invitum by his creditors until the expiration of the period of thirty years limited in the deed, and hence, ⁵²³ that the sale of the land, under execution to the plaintiffs, was void and conveyed no title.

On the other hand, the plaintiffs contend that an express trust in land can only be created, under the statutes of this state, in writing, and that the deed of the defendant Hudspeth is in no sense the creation of a spendthrift trust, and only limits the sequestration of the land for debts contracted by Hudspeth, and does not prevent the land from being sold to satisfy a judgment based upon a tort of said Hudspeth.

In view of the conclusion herein reached it is not necessary to follow the able and ingenious argument of counsel in reference to the creation of an express trust by the verbal direction of the donor and the subsequent written declaration of the trustee or grantee.

The doctrine of spendthrift trust is recognized in this state: *McIlvaine v. Smith*, 42 Mo. 55, 97 Am. Dec. 295; *Partridge v. Cavender*, 96 Mo. 457, 9 S. W. 785; *Lampert v. Haydel*, 96 Mo. 439, 9 Am. St. Rep. 358, 9 S. W. 780, 2 L. R. A. 113; *Pugh v. Hayes*, 113 Mo. 424, 21 S. W. 23.

But whether a conveyance created a spendthrift trust is always the question, primarily, for consideration.

A spendthrift trust is the term commonly used to designate a trust created for the maintenance of the cestui que

trust, and to secure the fund against the improvidence of the cestui que trust. The English rule, which has been adopted in most of the states of this Union is, that it is against the policy of the law for the grant to be so limited that a donee shall have the possession and enjoyment of the property, but shall not have the power of alienation, or that the property shall not be liable for his debts. Under the English law it is competent to make the estate determinable, as upon the bankruptcy of the donee, in which event, the estate is to revert to the donor, or to some person specified in the grant. In such case the creditor is deprived of the estate by the act which deprives the donee thereof. But where no such provision for the determination of the ⁵²⁴ estate is contained in the grant, the property will pass to the assignee in bankruptcy.

The American doctrine differs from the English rule, and is thus stated in 26 American and English Encyclopedia of Law, second edition, 139: "This doctrine is, that it is lawful for a testator or grantor to create a trust estate for the life of the cestui que trust, with the provision that the latter shall receive and enjoy the avails at times and in amounts either fixed in the instrument or left to the discretion of the trustee, and that such avails shall not be subject to alienation by the beneficiary nor liable for his debts."

The most learned discussion of the subject, and of the difference between the English and the American doctrine is that of Mr. Justice Miller in *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254. The American and English Encyclopedia aforesaid, at page 140 et seq., has collected the arguments, pro and con, bearing upon the two doctrines, but it is not necessary to the determination of this case to pursue the inquiry further.

In order to create a spendthrift trust certain prerequisites must be observed, to wit: 1. The gift to the donee must be only of the income. He must take no estate whatever, have nothing to alienate, have no right to possession, have no beneficial interest in the land, but only a qualified right to support, and an equitable interest only in the income; 2. The legal title must be vested in a trustee; 3. The trust must be an active one, not a mere dry trust which may be executed under the statute of uses: 26 Am. & Eng. Ency. of Law, 2d ed., 142 et seq.; *McIlvaine v. Smith*, 42 Mo. 55, 97 Am. Dec. 295; *Partridge v. Cavender*, 96 Mo. 457, 9 S. W. 785; *Lam-*

pert v. Haydel, 96 Mo. 439, 9 Am. St. Rep. 358, 9 S. W. 780, 2 L. R. A. 113; Kingman v. Winchell (Mo.), 20 S. W. 296; Ehrisman v. Sener, 162 Pa. St. 577, 29 S. E. 717; Keyser's Appeal, 57 Pa. St. 236; Rife v. Geyer, 59 Pa. St. 393, 98 Am. Dec. 351; Upham v. Varney, 15 N. H. 462; Lear v. Leggett, 2 Sim. 479, 1 Russ. & M. 690, 7 L. J. Ch. (O. S.) 127, 29 R. R. 143; Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504; Blackstone Bank v. Davis, 38 Mass. 42, 32 Am. Dec. 241.

"On the other hand, where the cestui que trust has ⁵²⁶ an absolute right to the fund or its avails, such as a right to occupy the land and to receive the income therefrom, . . . or where it is his absolute property and may therefore be alienated by him," or where the land is conveyed upon a simple condition that it shall not be subject to the grantee's debts, no spendthrift trust arises or is created, and the donee's interest may be sold under execution or sequestered in equity: 26 Am. & Eng. Ency. of Law, 2d ed., 144; 1 Jones on Real Property, sec. 663; Gray's Restraints on Alienation, sec. 259; Potter v. Merrill, 143 Mass. 190, 9 N. E. 572; Maynard v. Cleaves, 149 Mass. 307, 21 N. E. 76; Smeltzer v. Goslee, 172 Pa. St. 298, 34 Atl. 44; Young v. Easley, 94 Va. 193, 26 S. E. 401.

The deed to the defendant Hudspeth here involved falls radically short of the requirements of the rule as to the creation of spendthrift trusts, and especially so in the following particulars: 1. No trust estate is created; 2. No trustee is appointed; 3. Hudspeth's interest is not limited to the enjoyment of the income, nor is his right simply a right to support; 4. An absolute estate in fee simple is vested in Hudspeth; 5. Hudspeth is given the right of possession, of managing and controlling the property, and of receiving the whole income therefrom without let or hindrance.

In short, the conveyance to Hudspeth is of the whole legal title with all the incidents and rights appurtenant thereto, with only a futile attempt to annex repugnant conditions thereto to the effect that the land shall not be liable for the payment of any debts he had, or might thereafter contract during a period of thirty years, and that he should not have power to sell, encumber or dispose of the property for a like period except by will, and with the further qualification that if he sold, or attempted to sell or encumber, the property dur-

ing that period, the title shall immediately vest in the grantors.

Ever since the statute of *quia emptores* was enacted ⁵²⁶ the rule of law has been that "after an absolute conveyance in fee simple, a clause providing that the grantee shall not mortgage or dispose of the property is repugnant and void": *Lawrence v. Singleton* (Tenn.), 17 S. W. 265; *Hall v. Tufts*, 18 Pick. 455; *Gleason v. Fayerweather*, 4 Gray, 348; *Walker v. Vincent*, 19 Pa. St. 369; *Laval v. Staffel*, 64 Tex. 370.

So, also, "a condition that land conveyed shall not be subject to the grantee's debts is in restraint of alienation and void. Notwithstanding such condition, the land is subject to levy on execution, and passes to an assignee in bankruptcy. Liability for debts is an incident of property, just as the right to convey it is": 1 *Jones on Real Property*, sec. 663.

In *Tillinghast v. Bradford*, 5 R. I. 205, Ames, C. J., said: "Certainly no man should have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit should be also amenable to the demands of justice."

It follows that the deed in question, whether executed in pursuance of either a written or verbal direction of Robert N. Hudspeth or by the grantors of their own motion, wholly fails to create a spendthrift trust.

Unless, therefore, the conditions annexed to the absolute grant are sufficient and legal, the land in question was subject to the debts of the defendant Hudspeth.

The defendants tacitly concede that such general limitations, even with a provision for cesser, cannot have the effect in law of cutting down the absolute grant or of withdrawing the property from the reach of the grantee's creditors, but they contend that it is legal to limit the right of the grantee, in fee simple, to convey, mortgage or dispose of the property, and likewise to prohibit it from being seised by the grantee's creditors for a limited period of time.

In support of their contention the defendants cite and rely upon 2 *Washburn on Real Property*, 5th ed., ⁵²⁷ p. 9; *McWilliams v. Nisly*, 2 Serg. & R. 507, 7 Am. Dec. 654; *Langdon v. Ingram*, 28 Ind. 360; *Stewart v. Brady*, 3 Bush (Ky.), 623; *Stewart v. Barrow*, 7 Bush (Ky.), 368.

Washburn lays down the rule that a fee may be limited so as to restrain the conveyance for a certain time. The

Pennsylvania case cited holds that while a general or perpetual restraint of alienation is repugnant and void to a fee simple, nevertheless a partial restriction for a particular time or against conveying to a particular person is good.

The same general doctrine is stated in the Indiana case cited, although the real estate there involved was a trust estate, and the direct question here involved was not there decided.

In *Stewart v. Brady*, 3 Bush (Ky.), 623, the land was devised subject to a limitation upon alienation until the devisees attained the age of thirty-five years, and it was held a valid restriction against her voluntary disposition of the property, but insufficient to prevent the land being sold for the payment of her debts.

On the other hand, Jones on Real Property, section 662, points out that a condition attached to an absolute fee that the grantee shall not alienate within a limited time has been held void in *Murray v. Green*, 64 Cal. 363, 28 Pac. 118, *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61, and *McCleary v. Ellis*, 54 Iowa, 311.

In *Overman's Appeal*, 88 Pa. St. 276, the supreme court of Pennsylvania, speaking to this subject, said: "It contravenes that general policy which forbids restraints on alienation and the nonpayment of honest debts. . . . Property tied up for half a century contributes nothing to the general wealth, while it is a great stretch of liberality to the ownership of it to suffer it to remain in this anomalous state for so many years after its owner has left it behind him. Clearly, it is against public interest that the property of an after future generation shall be controlled by the deed ⁵²⁸ of a former period, or that the nonpayment of debts should be encouraged."

It is the policy of the law in this state to permit the creation of spendthrift trust, and to allow the owner of property to apply a portion, or the whole thereof, to the maintenance and support of those he wishes to provide for and who are not able to control and manage their own affairs. So long as such a conveyance does not offend against the law of perpetuity, and so long as the conveyance is a proper trust, the courts will observe the wishes of the donor. So, too, it is competent for the owner to convey or devise property in trust for the benefit of those the donor wishes to befriend,

and such trusts may continue for a limited period, or even during the life of the beneficiary.

In all such cases, however, the beneficiary has only an equitable interest and not the fee in the land. Such rules, however, do not apply where the conveyance is absolute to the donee coupled with either a perpetual or limited power of alienation, or attempts to place the property beyond the reach of the creditors of the donee. The better rule and the better reason is that such limitations or conditions cannot be grafted upon a fee simple estate, because they are repugnant to the absolute ownership incident to the fee. Donors who have such limited confidence in their donees should create spendthrift trusts, and not, as here, attempt to evade and violate fundamental and wise provisions of law in reference to mere legal estates.

It follows that the conditions against alienation or liability for debts in the deed here involved are void because they are repugnant to the absolute ownership granted by the deed to the grantee.

2. Defendants next contend that the trial court erred in excluding the certified copy of the judgment. The gist of this contention is that the certified copy showed ⁵²⁹ that the judgment was not a final judgment, because the motions for new trial and in arrest had not been acted upon at the time the execution was issued.

The trial court properly excluded the evidence offered for the reason that under the issues tendered by the defendants and conceded by the plaintiffs, the judgment under which the execution issued was alleged to be a final judgment. Such being the issues it was incompetent for the defendant to contradict them.

3. Lastly, the defendants contend that the sheriff's deed is void for the reason that it does not affirmatively appear therein that the defendant Hudspeth was afforded an opportunity to select the portion of the land which he would hold as his homestead.

The deed in question recites that commissioners were appointed and that they set apart fifty acres as a homestead for the defendant. The deed does not affirmatively show that prior to the appointment of the commissioners, the sheriff gave the defendant, Hudspeth, an opportunity to choose that portion of the land he would select as his homestead. It is also

true that the defendant offered no evidence whatever tending to prove that the sheriff had failed in his duty in this regard.

Section 3617 of the Revised Statutes of 1899, which was the law in force at the date of the levy and sale under the execution in this case, provides that when an execution is levied upon a homestead, the homesteader shall have a right to designate and choose the part of the land to which the exemption shall apply, "and upon such designation and choice, or in case of a refusal to designate or choose, the sheriff levying the execution shall appoint three disinterested appraisers who shall, first being sworn to the faithful discharge of their duties, fix the location and boundaries of such homestead, ⁵³⁰ and the sheriff shall then proceed with the levy of such execution upon the residue of such real estate, as in other cases; and such proceedings in respect to the homestead shall be stated in return upon such execution."

This court has frequently held that unless the sheriff gives the homesteader a fair opportunity to make his selection, the sale is void, and that until such opportunity is afforded and such homesteader refuses to make a selection, the sheriff has no power to have a homestead set apart: *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649, 33 S. W. 448; *St. Louis Brewing Assn. v. Howard*, 150 Mo. 450; *Keene v. Wyatt*, 160 Mo. 31, 60 S. W. 1037, 63 S. W. 116.

Ordinarily the law is that an officer is presumed, in the absence of a showing to the contrary, to have performed his duty. Under this general presumption a sheriff, except for the provisions of the statute, would be presumed to have performed his duty and to have given the homesteader an opportunity to designate and choose the portion of the land he desired to retain as his homestead. But a homestead is purely a statutory creature, and the statute in this state has prescribed the steps which must be taken before land which is, in whole or in part, a homestead, can be lawfully subjected to seizure and sale.

The section of the statute quoted requires the sheriff, first, to give the homesteader a fair opportunity to make a choice and selection, and only authorizes the sheriff to have the homestead set apart after the homesteader has refused to designate or choose. If the statute stopped here, the general presumption of law that an officer has performed his duty would obtain. But the statute expressly requires that "such proceedings in respect to the homestead shall be stated in re-

turn upon such execution." This statute destroys the general presumption of law aforesaid, and expressly requires that all of the preliminary steps provided to be taken before property in which a homestead right exists ⁵³¹ can be sold must be stated in the return upon the execution.

But whilst such are the provisions of the statute as to the return, there is no provision in the statutes that the sheriff's deed shall contain all of the recitals which the statute requires the return or execution to set out. The return of the sheriff on the execution, in question here, is not contained in the record, nor is there any evidence that it did not fully comply with the requirements of the statute. The defendants, therefore, have wholly failed to afford the foundation upon which the statute bases their right to make the objection to the validity of the sale here contended for. From such failure so to do, it is fairly inferable that no such basis existed, and as the statute does not require such recitals in the sheriff's deed, and only requires them to be stated in the return on the execution, this contention of the defendants must be resolved against them.

4. It is said by defendants that the trial court erred in treating this case as a case in equity. The answer of the defendants set up an equitable defense, but asked no affirmative, equitable relief. The case, therefore, is a case at law, and not one in equity: *Martin v. Turnbaugh*, 153 Mo. 172, 54 S. W. 515. The defendant, however, failed to preserve any exception to this action of the court, but, on the contrary, acquiesced therein, and tried the case as if it was one properly cognizable in equity. They are, therefore, not in position now to assign this as an error. In view, however, of what is hereinbefore said, it is immaterial whether the case be treated as one in equity or one at law, for in either event the result would be the same.

The seventy acres of land in dispute were sold by the sheriff for the insignificant sum of fifty dollars, and it would appear a great hardship to the defendant to lose the land for such a price, and therefore this court has ⁵³² sought, with great care, to find some ground upon which to set aside the sale, to the end that the land may be made to realize its full value, but after a careful and painstaking examination of the case, the court is unable so to do, and the defendant Hudspeth must suffer the consequences of his own failure to see, at the proper time, that the land brought its full value.

Finding no error in the record, the judgment of the circuit court is affirmed.

All concur.

Spendthrift Trusts are discussed in the monographic notes to *Garland v. Garland*, 24 Am. St. Rep. 686-697; *Smith v. Towers*, 9 Am. St. Rep. 405-408; and in the subsequent cases of *Jackson Square Loan etc. Assn. v. Bartlett*, 95 Md. 661, 93 Am. St. Rep. 416, and cases cited in the cross-reference note thereto; *Hutchinson v. Maxwell*, 100 Va. 169, 93 Am. St. Rep. 944, and cases cite in the cross-reference note thereto.

The Right of a Homestead Claimant, when his property is levied upon, to select the part which he desires to claim as exempt, is discussed in *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Fogg v. Fogg*, 40 N. H. 282, 77 Am. Dec. 715.

FISCHER v. CITY OF ST. LOUIS.

[189 Mo. 567, 88 S. W. 82.]

JURY TRIAL—Inadequate Verdict for Personal Injuries.—Where a woman, sixty-eight years of age, suffers personal injuries by reason of a defect or obstruction in a public street, and brings against the city an action in which it is shown that her ankle was broken and dislocated, wherefrom she was confined to her bed for several months and suffered the pain and discomfort usually incident to such an injury, and remained a cripple, able to walk only by artificial aid up to the time of the trial, a verdict of the jury finding all the issues in her favor, but fixing her damages at one dollar will be set aside. It cannot be construed as in effect a finding for the defendant. (pp. 384, 390.)

MUNICIPAL CORPORATIONS—Streets—Negligence—Question for the Jury.—If a large millstone is on a level with the sidewalk on its inner side, but extends more than two feet into the sidewalk toward the street and is there five inches above the plane of the sidewalk, and between it and the curb is a wide extent of sidewalk over which one must pass, it is for the jury to say whether or not the municipality was negligent in permitting the stone to remain. (p. 386.)

MUNICIPAL CORPORATIONS.—The Fact that a Millstone in a Public Street had Been There for Twenty-seven Years before it caused any injury does not exempt the municipality from liability to a person injured thereby, if the city was originally negligent in permitting the stone to be there. (p. 386.)

MUNICIPAL CORPORATIONS—Streets—Contributory Negligence.—Where a street is dark and the person using it knows of, and does not forget, an obstruction, but makes a conscious effort to avoid it, and is injured, it is for the jury to say, from all the surrounding circumstances, whether the person injured acted with the prudence of a reasonable person. He cannot be judged guilty of contributory negligence as a matter of law. (p. 387.)

DAMAGES—Verdict for Immoderately Small Sum.—The court in an action to recover for personal injuries due to the defendant's negligence may set aside a verdict because immoderately small, as where under the evidence it must be attributed to whim, arbitrariness, or a disposition to play fast and loose with the law and the substantial rights of the appellant. (pp. 389, 390.)

Hickman P. Rodgers, for the appellant.

Charles W. Bates and William F. Woerner, for the respondent.

⁵⁷⁰ LAMM, J Action against respondent city for personal injuries predicated on its alleged negligence in permitting the half of a millstone or grindstone of considerable dimensions to be and remain in the footway or sidewalk of one of its thoroughfares, Second street. Damages laid at five thousand dollars. Tried to a jury. Verdict, one dollar.

Asserting dissatisfaction over this small verdict, appellant filed a motion for a new trial challenging the verdict, because, she says, it was the result of passion, prejudice or misconduct on the part of the jury; because ⁵⁷¹ the verdict was inadequate and not commensurate with the injuries received; and because the jury failed and refused to heed the instructions of the court in that, having found the issues in favor of plaintiff, it failed to fairly compensate her for her injuries.

The court below disallowed this motion and plaintiff duly appeals here, assigning said ruling as error.

It is disclosed by the record that the pleadings are unexceptionable and the instructions are unassailed. That at the close of appellant's case respondent challenged the sufficiency of her evidence to make a case and the trial court overruled a demurrer thereto. And that the jury was commanded by the court, inter alia, as follows: "That if you find for the plaintiff you will assess her damages in such sum, as from the evidence you believe will be a fair and reasonable recompense for the injuries received by her. In fixing the amount of such damages, you will take into consideration the nature and extent of the physical injuries received, the pain and mental anguish endured, as well as the pain and inconvenience, if any, which you believe from the evidence will reasonably result from said injuries in future."

The undisputed facts follow: Second or Columbus street is a public street of St. Louis. At a certain place in this street, close to its junction with Duchoquette street, there is a sidewalk or a footway of cinders, which walk at other points along the street was made of other material. One Smith owns a tenement abutting on this cinder walk. The street line of his premises is about eighteen inches higher than the level of the walk. Smith's house stands back from the street and is approached from the street by a gateway. In front of this gate, at the outer street limit, is a half of a grindstone or millstone extending along the outside street line three or four ⁵⁷² feet, and projecting therefrom over into the sidewalk, in extreme limit, two and one-third feet. This stone, because of the uneven lay of the walk, or for some other cause only to be guessed at, is flush with the plane of the walk at the gate, but five inches above the plane of the walk at the point of farthest projection into the footway, so that a person walking in the footway close to the gate might meet with little or no obstruction, but the same person walking two feet and four inches away from the gate would meet an obstruction five inches high. Defendant introduced evidence, not controverted, that this millstone had been there for twenty-seven years and filled the office of a stepping-stone to enter the premises of Smith. The evidence indicated that the walk was of considerable width and that there was ample room for pedestrians between the millstone and the curb. The evidence also indicated the nearest city light was two hundred feet away. The character of this light was not shown, but it appears that at the point in question at the time in question the stone was obscured by darkness.

Appellant is an old washerwoman, burdened with the weight of sixty-eight years. Her daughter lived adjacent to the premises of Smith and had resided there for three years. She had visited her, say, a dozen times, and a few times, say three, had passed by this stone on said visits. It stands confessed that she was familiar with the location and character of the obstruction. On the evening of January 5, 1902, appellant visited her daughter. On returning home accompanied by her husband, after 9 o'clock P. M. in the dark, she fell over this stone, thereby breaking and dislocating her left ankle, wherefrom she was

confined to her bed for several months, suffered the pains and distress naturally incident to such injuries, and, as reasonably to be expected at her time of life, the broken bones did not knit by first impression nor did her injuries heal kindly, but she remained crippled and, so late as October, ⁵⁷³ 1902, at the trial was obliged to walk with artificial aid. No question whatever is raised about the extent or character of her injuries and resulting pains.

The old lady told her story on the stand in a broken way with the idioms and phrasing of her German mother-tongue, and with a consequent lack of clearness on cross-examination, needing and appealing for a touch of sympathetic intelligence to clear away obscurity. Substantially and briefly she testified that as she was walking that night on the street, she, in a general way, had the stone in mind, but that in the darkness she was confused as to its location and as to her proximity to it and her distance from the street line, and that in this condition of things, while intending to avoid the obstruction and thinking she was well outside the line of danger, she fell over it and suffered said hurts.

The foregoing is the whole story in small compass and presents the only facts and issues for our adjudication. And on this record it is self-evident that if appellant was not guilty of such want of care as would, as a matter of law, be contributory negligence, and if under the evidence, as a matter of law, it cannot be said that respondent was not guilty of negligence in permitting the character of obstruction indicated to be and remain in the footway for pedestrians in one of its streets, we must avow judicial sympathy with the contention of appellant, and that sympathy has its root in the following condition of things: the jury found the issues for appellant; now, the only allowable meaning of that finding when logically analyzed and interpreted is: 1. That the jury found that respondent was negligent; 2. It found that appellant was using due care; and 3. It found that her injuries resulted from respondent's negligence. There is one other allowable hypothesis, and that is that the jury under the facts intended to and did, in all but name, find for defendant, but shrunk from meeting the issues and put its verdict in the form it did on the question of costs.

⁵⁷⁴ In the evolution of a trial a verdict of a jury may be likened to a correct conclusion in a syllogism, and if the conclusion be not correct it would put the law to open shame if a court, having due regard always for the independence of the jury and its power within bounds, did not apply a correcting hand to see that a perverted conclusion was corrected. Here we have a venerable woman coming into a court of justice for redress. Her very simplicity and humbleness and age bespeak tenderness at the hands of the law. It is adjudged that her serious injuries were the result of respondent's negligence and were suffered without her fault, and yet for a broken and dislocated ankle and a long period of mental and bodily distress she is given a bagatelle. Courts should be diligent to see that the law, which is itself reason and common sense, be applied with the aid of right reason to produce a reasonable result in the every-day affairs of life. The gravity necessary in the administration of justice to entitle the law to respect, necessitates that mere caprice and practical jokes have no part or parcel therein, and it results if there was substantial unimpeached evidence upon which the jury could find that appellant was exercising due care and that respondent was negligent, this verdict, considering the grievous hurts of appellant, disturbs the moral sense and should be brushed aside.

Respondent recognizes the delicacy of the situation and insists: 1. That there was no evidence of negligence and hence plaintiff should have been nonsuited; 2. That appellant's evidence affirmatively shows that she was not exercising due care and hence she should have been nonsuited; and 3. That the verdict, fairly considered, is a verdict for respondent on all the issues and was the result of blandness on the jury's part in the matter of costs. Of these in their order.

1. On the issue of the negligence of respondent in allowing the stone to remain in the street it is insisted ⁵⁷⁵ that the premises of Smith were higher than the level of the sidewalk, that the stone was a proper stepping-stone to reach these premises, and that the city was in nowise negligent in permitting it to remain and be so used, considering the width of sidewalk left unimpeded for pedestrians. We are not called upon to pass on the question whether or not in a wide sidewalk, where ample room is left for

foot-travelers and where houses have been so built, flush with the street, that stepping-stones become necessary for convenient ingress and egress, because of the street grade or for other reasons, a suitable stepping-stone permitted on the edge of the sidewalk would create a nuisance in the street and render a city responsible for injuries to a pedestrian stumbling thereon in the dark. This case is not such a case and must stand on its own facts. The evidence shows that no reason exists why the step should not have been inside the building line; for Smith's house was not flush with the street but set back; that there was a rise of eighteen inches from this stone to his premises; that the plane of the sidewalk at the outside street line coincided with the plane of the stone and that the maximum rise in the step, so called, was in the street over two feet away from the gateway and thus it would happen that a person stepping on this stone from the street, designing to enter Smith's premises, would have to take practically another step before he reached the gateway and when he reached that point he would have to step up eighteen inches to get into Smith's premises. Vice versa, a person leaving Smith's premises by this gateway would step down eighteen inches to the stone, and when that step was taken he would be practically on the level of the sidewalk at that immediate point. He would then take a forward step on the stone and would be at the edge of the step-off of five inches to the sidewalk at that point. So that, while we are not called upon to decide that a suitable stepping-stone might not have been legally placed to enter ⁵⁷⁶ Smith's premises, we are prepared to say that the character of stepping-stone permitted in that sidewalk, projecting, as it did, an unnecessary distance into the walk, presents a case where the question of negligence was properly sent to the jury. Indeed, the stone might well be considered more of a snare than a stepping-stone; for if it were not there, a person entering or leaving Smith's gateway would have practically no more or no less of a step up or down to enter or leave than he would have with the stone in place. The long period of time that this condition of things was allowed to exist does not tend to render it sacred in the eyes of the law, for an original sin of negligence will not ride into the wilderness on a scapegoat of mere time, and it must not be lost sight of

that to pedestrians the mere fact that a condition has existed for a long time is of no significance, except it speaks to the point of notice and knowledge which necessarily varies as to each one.

We are cited to two cases by the learned counsel of respondent as sustaining its contention, but neither, in our opinion, lays down any principle determinative of the issues under this record. In one of them, a Kentucky case, *Teager v. City of Flemingsburg*, 109 Ky. 746, 95 Am. St. Rep. 400, 60 S. W. 746, 53 L. R. A. 791, a street was on a grade and a step of a few inches was built or permitted by the city across a sidewalk to equalize this grade and to serve as a watershed, throwing the surface water of the street from the pavement, and the question was whether the building and maintenance of a sidewalk with a step, which, from the nature of the grade, the city government deemed necessary and proper, is of itself such negligence as will warrant a recovery by one injured in a fall caused by the step. It will be seen at a glance that the Kentucky case is not on all-fours with the case at bar. There a city, using its best engineering judgment, adopts a plan to level the grade and to serve as a watershed and in so doing acted within its delegated discretion and power to subserve public ends, there being no evidence that ⁵⁷⁷ the step was out of repair or unskillfully constructed. The same principle has been applied in this state by this court and the other appellate courts in proper cases.

In a New York case (*Dubois v. City of Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273), it appeared that at a place brilliantly lighted at the time, Dubois, running to a fire in the night-time, stumbled over a stone that was placed along the curb of a street in front of the postoffice as a convenience to persons entering and alighting from carriages and having business at the postoffice. In that case, as in this, there was ample room for the use of pedestrians left. The stone was three feet and four inches in length, twenty inches wide and fourteen inches high. It laid lengthways with the curb and at the north end of the stone was a lamp post of about one-half the width of the stone. The most that can be said for the New York case is that it was therein held that a stepping-stone on the edge of a curb for the comfort and convenience of the public did not constitute a nuisance in the absence of evi-

dence justifying the conclusion that it was dangerous to travelers passing along the street and in the absence of evidence that the city authorities were chargeable with negligence in allowing it to remain where it was located. In that case, too, it was held that plaintiff was chargeable with negligence contributing to his injury. He was well acquainted with the locality and, as said, it was brilliantly lighted at the time and if he had been careful in exercising his faculties he would have avoided the accident. The cause was reversed and a new trial granted with costs to abide the event. So that, the facts are dissimilar and the case does not announce any doctrine that might not be granted, and yet leave this case a proper one for a jury, as in our opinion it was on the issue of negligence.

2. Was appellant guilty of such want of care as defeats her recovery as a matter of law? On the facts set forth, and they are undisputed, we cannot so hold. ⁵⁷⁸ The place was dark and while she knew of the location and character of the obstruction and, being not forgetful at the time that she was in proximity to it, made conscious effort and intended to avoid it, yet it was clearly a question for the jury whether she, in the confused surrounding circumstances, acted with the prudence of a reasonable person while and in proceeding along that sidewalk at that time. The danger was not known to her as so obvious and glaring as to compel her to cease the use of the sidewalk and take to the street or to the other side and, if it be allowed that the city was negligent, it cannot be contended that it had the right to place upon appellant the hard necessity of an absolutely infallible judgment in the darkness. The following cases, with many more, support this view: *Graney v. St. Louis*, 141 Mo. 180, 42 S. W. 941; *Flynn v. Neosho*, 114 Mo. 567, 21 S. W. 903; *Loewer v. Sedalia*, 77 Mo. 431.

The case, then, was properly sent to the jury on the issue of due care in appellant and the jury had substantial evidence upon which to base a finding that due care was exercised.

3. But it is stoutly contended by respondent that on all the facts of the case the jury should have found for respondent and that a one dollar verdict in substance and

effect amounts to that, merely taking the peculiar form it did out of regard for appellant on the question of costs.

“Raking in the dead ashes of antiquated cases,” to borrow the animated language of Chancellor Kent in discussing the earlier cases pertaining to the rule in *Shelley's Case*, it may be found that a notion once prevailed that in an action founded in damages sounding in tort, the court might set aside a verdict excessively great as indicating passion, prejudice or misconduct on the part of a jury, but would not meddle with a verdict immoderately small. This doctrine was illogical and, being based on no substantial reason, is exploded. The true rule seems to be that a court with great hesitation ⁵⁷⁹ will invade the province of a jury and interfere with a verdict for damages sounding in tort for personal injuries, crim. con., seduction, slander, libel and other cases, especially where malice is an element and smart money or exemplary damages are allowed. But judges have never renounced their right, as an element in the administration of the law, to set aside a verdict, either excessive in bigness or ridiculous in littleness, where the result reached shocks the understanding and cannot be fairly justified on any hypothesis except misconduct or prejudice or willful disregard of instructions. In arriving at a conclusion, however, the presumption is in favor of the good conduct of the jury and, therefore, if on the whole record the case preponderates in favor of the defendant, or is evenly balanced in the scales, or where, as in a case of assault, there was strong provocation, and where, as in case of slander, etc., there were facts tending to prove mitigation of damages, the courts have refused to interfere with nominal verdicts although on first blush they may appear illogical. It would serve no useful purpose to collate the cases or undertake to distinguish them, for they abound in nice refinements, and, after all, each case depends upon its own merits and cannot be settled offhand on a mere general rule. The various propositions asserted above may be found discussed and applied in *Weinberg v. Metropolitan St. Ry. Co.*, 139 Mo. 286, 40 S. W. 882; *Haven v. Missouri R. R. Co.*, 155 Mo. 216, 55 S. W. 1035; *Dowd v. Westinghouse Air Brake Co.*, 132 Mo. 579, 34 S. W. 943; *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74; *Leahy v. Davis*, 121 Mo. 227, 25 S. W. 941; *Watson v. Harmon*, 85 Mo. 443, 34 S.

W. 943; Gregory v. Chambers, 78 Mo. 294; Pritchard v. Hewitt, 91 Mo. 547, 60 Am. Rep. 265; Boggess v. Metropolitan St. Ry. Co., 118 Mo. 328, 23 S. W. 159, 24 S. W. 210; Goetz v. Ambs, 22 Mo. 170; Fairgrieve v. City of Moberly, 29 Mo. App. 141; Chouquette v. Southern R. R. Co., 152 Mo. 257, 53 S. W. 897.

In Pritchard v. Hewitt, 91 Mo. 550, 60 Am. Rep. 265, after quoting approvingly the reasons for the general rule of noninterference from Graham and Waterman on New Trials, to the effect that, "The reason for holding parties ⁵⁸⁰ so tenaciously to the damages found by the jury in personal torts is, that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury governed by a sense of justice. . . . To the jury, therefore, as a favorite and almost sacred tribunal, is committed, by unanimous consent, the exclusive task of examining the facts and circumstances, and valuing the injury and awarding compensation in damages. The law that confers on them this power and exacts of them the performance of this solemn trust, favors the presumption that they are actuated by pure motives, . . . and it is not until the result of the deliberation of the jury appears in a form calculated to shock the understanding and impress no dubious conviction of their prejudice and passion that courts have found themselves compelled to interpose," Brace, J., speaking to the point, says: "Of course, it goes without saying that actions ex delicto, wherein the damages may be measured with some degree of certainty, are not within the rule, and that those cases where the damages, under the circumstances, are such as to shock the 'understanding,' and induce the conviction that the verdict was the result of either passion, prejudice, or partiality, are exceptions to this rule."

In Haven v. Missouri R. R. Co., 155 Mo. 216, 55 S. W. 1035, the court, nisi, set the verdict aside for inadequacy, and its action was sustained by this court. Marshall, J., discussing the matter now in hand, said: "In other words, where a jury has returned a verdict for nominal damages in a case where the plaintiff is not entitled to any damages, the verdict will not be set aside in the appellate court at the instance of the plaintiff."

When it is determined, as it must be in the case at bar, that there was persuasive evidence of the negligence of respondent city, and when it is determined, as it must be, that there was little or no evidence showing a want of care on the part of appellant, and that all ⁵⁸¹ the evidence in that behalf fell from her own lips and when fairly considered does not show want of due care, and when the serious character of the injuries of appellant stands confessed, as here, it follows, we think, that the verdict of the jury in this case ought not to be attributed to a benevolent disposition on the jury's part toward appellant in the matter of costs, and as a finding for respondent city based on the substantial evidence, but must be attributed to whim and arbitrariness and a disposition to play fast and loose with the law and the substantial rights of appellant, and should be explained alone as the product of prejudice or some kindred motive.

Holding these views, we conclude the learned circuit judge erred in not sustaining appellant's motion for a new trial, and therefore the cause is reversed and remanded with directions to the lower court to set aside the order overruling appellant's motion for a new trial; to sustain that motion and grant appellant a new trial; and for further proceedings in the cause.

All concur, except Marshall, J., not sitting.

On the Liability of a City to a Pedestrian injured by a step or drop in a sidewalk, see Teager v. Flemingsburg, 109 Ky. 746, 95 Am. St. Rep. 400; Blyhl v. Waterville, 57 Minn. 115, 47 Am. St. Rep. 596; Robert v. Powell, 168 N. Y. 411, 85 Am. St. Rep. 673.

A Verdict for Damages in a personal injury case, if manifestly inadequate, may be set aside or increased by the appellate court: See Sullivan v. Vicksburg etc. R. R. Co., 39 La. Ann. 800, 4 Am. St. Rep. 239; Whitney v. Milwaukee, 65 Wis. 409, 27 N. W. 39; Henderson v. St. Paul etc. R. R. Co., 52 Minn. 479, 55 N. W. 53; Miller v. Delaware etc. R. R. Co., 58 N. J. L. 428, 33 Atl. 950; Ellsworth v. Fairbury, 41 Neb. 881, 60 N. W. 336; Michalke v. Galveston etc. Ry. Co. (Tex. Civ. App.), 27 S. W. 164.

DAUSMAN v. RANKIN.

[189 Mo. 677, 88 S. W. 696.]

WILLS.—Influence to be Undue and Sufficient to Vitiate a Will must be such as amounts to over-persuasion and coercion or force, destroying the free agency and will and power of the testator. It must not be the influence of affection or attachment, nor the result of a desire on the part of the testator to gratify the wishes of one loved, respected, and trusted by him. (p. 410.)

WILLS.—The Burden of Proving Undue Influence is on the party alleging it, but like every other question of fraud or bad faith, it is a question of fact, and can rarely be proved by direct or positive evidence, but must be established by facts and circumstances. (p. 410.)

WILLS—Undue Influence, Presumption of from Fiduciary Relation.—Where the beneficiary under a will occupies a fiduciary relation to the testator, undue influence is presumed and is fatal to a bequest unless rebutted by proof of free deliberation and spontaneity on the part of the testator and good faith on the part of the devisee or legatee. (p. 410.)

WILLS—Undue Influence—Discrimination Between Children.—While discrimination in favor of one child over another is not evidence of undue influence, yet if that influence does appear, and the favored child prepares the will by which he obtains the bulk of his parent's property, to the detriment of his brothers and sisters, the burden is on him to show that the will was the result of deliberation and spontaneity on the part of the testator and absolute good faith on the part of the favored devisee or legatee. (p. 414.)

WILLS—Undue Influence, Verdict of, When Sustainable.—Where the evidence tends to show that before and at the time a will was written the child of the testator favored therein had acquired control of her business and bore a fiduciary relation to her, that he had a strong control over her mind as to the disposition of her property, and that when she desired to aid either of her other children, she sought to keep them from knowing it lest he should raise a disturbance about it, and that she had become possessed of a false notion that one of her sons in law was living off of her estate, and she was in feeble health and of great age, and a will previously made by her had been destroyed by the beneficiary under her last will, and the will in contest had been drawn by him, by which he received the bulk of her estate, and that he was embittered toward his only sister, so that he would not speak to her, and exhibited this unnatural disposition to his mother, and that there was no reason why he should have been preferred over her other children, but many reasons to the contrary, a verdict of undue influence is sustainable. (p. 415.)

R. A. Frazier, J. G. Williams and James F. Green, for the appellant.

Sam Byrns and E. J. Bean, for the respondent.

⁶⁸¹ GANTT, J. This is an action instituted in the circuit court of Jefferson county, Missouri, at the January term, 1902, for the purpose of contesting the last will of Cecilia A. Rankin, deceased.

The petition is as follows:

“Plaintiff states that she is a child and heir at law of Cecilia A. Rankin, deceased, and as such is interested in her estate; that deceased was a single woman and departed this life in Jefferson county, Missouri, on the — day of April, 1901, possessed of a large estate of real and personal property; that her heirs at law are Charles T. and Eugene C. Rankin, defendants herein, and this plaintiff; that thereafter, to wit, on the seventeenth day of May, 1901, there was admitted to probate by the probate court of Jefferson county, and within five years from this date, a certain instrument in writing as and for the last will and testament of Cecilia A. Rankin, deceased, and bearing date August 17, 1899, and that letters testamentary thereon were on the — day of —, 1901, granted by said probate court to said Eugene C. Rankin as executor named in said supposed will; that by the supposed will plaintiff and defendants herein were made legatees.

“Plaintiff further states that at the time the said supposed will was subscribed by the said Cecilia A. Rankin, in her lifetime, and also at the time the same was published and declared as and for her last will and testament, said Cecilia A. Rankin was not of sound mind and disposing memory, but on the contrary, was wholly incapable of making a testamentary distribution of her affairs.

“Plaintiff further says that at the time said supposed will was executed by Cecilia A. Rankin, she was ⁶⁸² under the control of the defendant Eugene C. Rankin; that he possessed and exercised undue influence over her, and that the will and the mind of the said Cecilia A. Rankin was controlled and dominated by said Eugene C. Rankin, and that he caused his will to be substituted and his intention carried out in said will for that of Cecilia A. Rankin, deceased.

“Plaintiff says that by fraud and artifice resorted to and practiced by the said Eugene C. Rankin on Cecilia A. Rankin he induced her to attempt to make a will; that the supposed will was the result of the weak and unsound mind of the said Cecilia A. Rankin unduly controlled by the undue influence and fraud of the said Eugene C. Rankin, and that

said will is not her own free act and deed, and that said writing is not the last will and testament of the said Cecilia A. Rankin, deceased.

“Plaintiff, therefore, prays that an issue be made up whether said writing produced and admitted to probate as aforesaid be the last will and testament of Cecilia A. Rankin, deceased, or not, and that the same be set aside and for naught held, and that plaintiff recover her costs in this behalf expended.”

Defendant Eugene C. Rankin filed his answer as follows:

“Now, at this day, comes defendant Eugene C. Rankin, and for his answer to plaintiff’s petition denies that the said Cecilia A. Rankin, testatrix, was not of sound mind and disposing memory at the time of executing the last will and testament in plaintiff’s petition described and contested herein, and further answering denies that at the time said will was executed by Cecilia A. Rankin she was under the control of the said defendant Eugene C. Rankin, and denies that he possessed and exercised undue influence over her, and denies that the will and mind of the said Cecilia A. Rankin was controlled and dominated by him, the said Eugene C. Rankin, and denies that he caused his will to be ⁶⁸⁸ substituted and his intentions carried out in said will for that of Cecilia A. Rankin, and denies that the said will was not her own free act and deed, and denies that the said defendant, Eugene C. Rankin, resorted to any fraud or artifice of any kind whatever, and denies that he induced her to make a will, and denies that the said will was the result of the weak and unsound mind of the said Cecilia A. Rankin, unduly controlled by the undue influence and fraud of the said Eugene C. Rankin, and denies that the said writing is not the last will and testament of said Cecilia A. Rankin, deceased, and denies that she was incapable of making a testamentary disposition of her affairs.

“Defendant Eugene C. Rankin states the fact to be that the said Cecilia A. Rankin was at the time of the execution of the said last will and testament by her of sound mind and disposing memory; defendant further states that the said Cecilia A. Rankin departed this life on or about the seventeenth day of April, 1901, and that on the seventh day of May, A. D. 1901, the said will was duly admitted to probate by the probate court of Jefferson county; and that the last will and testament was the free act and deed of the said

Cecilia A. Rankin, and the untrammelled disposition of her property to the therein mentioned objects of her bounty.

“Wherefore, the defendant prays the court that the last will and testament of the said Cecilia A. Rankin be declared and established as her last will and testament.”

The action was dismissed as to the executor of the will, and defendant Charles T. Rankin filed his answer as follows:

“Now at this day comes Charles T. Rankin, one of the defendants in the above-entitled cause, and for answer to plaintiff’s petition filed herein, admits each and every allegation in said petition contained.”

The cause was tried before the court and a jury. The jury returned a verdict that the paper writing propounded ⁶⁸⁴ was not the last will and testament of said Cecilia A. Rankin.

Motions for a new trial and in arrest of judgment were duly filed, heard and overruled, and the defendant Eugene C. Rankin appealed to this court.

On the trial the defendant, Eugene C. Rankin, offered evidence of the due execution of the will.

Perry Bartholow testified that he had lived in the city of St. Louis since 1873, and was at the time of testifying assistant superintendent of supplies of the Louisiana Purchase Exposition Company; and prior to that time had been United States consul to Germany; that he had known Mrs. Rankin since 1878, having married her niece in that year. He identified his signature as a witness to the will, and stated that he signed the same at her request; that Mrs. Rankin read the will and signed it, and the witness asked her if it was her last will, and if she wanted him to sign it as a witness, and she said “yes,” and he did so; that at the time there were present in the room Ed Fletcher, Eugene Rankin, the testatrix, Mrs. Rankin, and Max Seaman. The will was executed on the 17th of August, 1899; that Mrs. Rankin at that time was in good health, but was an old woman; that he had often seen her since the death of her husband, and prior to the signing of the will; that at the time of the execution of the will she was a very strong-minded woman of fine education and refinement; that at that time Fletcher, the other witness, who was her nephew, boarded in the same house with her. On cross-examination he stated it was about 11 o’clock in the day when the will was executed; that Gene Rankin had written him that he would come up and wanted to see him;

that they had a typewritten copy of the will; that they went out to the house where Mrs. Rankin was staying in the city, and that he went upstairs and called her to come down and get through with the will, so that they could go down town; that Mrs. Rankin read the will and said that was what she ⁶⁸⁵ wanted; that Mrs. Rankin lived in De Soto or boarded there, and that she had been in St. Louis about six weeks or two months, came up there about the 4th of July; that he went out to the house for the purpose of witnessing the will; that the will was typewritten by a Mr. Jenkins in the Laclede Building. Jenkins was the witness' stenographer; that he, Bartholow, told Eugene Rankin to get a stenographer to write the will; that Rankin had a rough draft of it when he came into the office; that he had had it typewritten, and then they went out to the house and Fletcher was there; that Mrs. Rankin wrote her name to the will in the parlor in the presence of them all, and that witness asked her if that was her last will, and if that was what she wanted, and she said it was; that the notary asked her about the same question that he did, viz., if that was her last will; that Mrs. Rankin had told witness that she was going to have a will made, and had told him that she was going to leave her property to Eugene, her son; that if she did not do that it would be thrown away and squandered; that if she gave it to Mrs. Dausman (her daughter) it would be given to Dausman, and that he would throw it away, and that she was not going to give Charley, her son, any more to squander; that if she gave it to Charley he would not have a dollar in three months; that Mrs. Rankin at that time was seventy-three years old, was not very strong physically, and could not stand much exercise; but her mind was very clear; that Eugene Rankin's treatment toward his mother at the time his father died was such as a son's should be toward his mother. In regard to drinking he said he had seen Eugene C. Rankin full pretty often before and since his father's death; that he was sober about as long as he was drunk during the past thirty years. He had reformed about a year before this will was written.

Ed Fletcher testified he signed the will as a witness for Mrs. Rankin; that he was boarding with his ⁶⁸⁶ aunt there at the time, and she asked him to sign the will as a witness, and said it was her last will, and she wanted to leave her property that way; that he asked her when she signed it if she knew what she was signing, and she said she did, that

she had left her property as she wanted to; that the condition of her mind was all right, and she knew what she was doing. On cross-examination he stated that he had been down to the butcher-shop, and when he came back Eugene Rankin and Perry Bartholow were there, and he went in and witnessed Mrs. Rankin's signature; that the execution of the will occurred between 10 and 11 o'clock on that day; that a notary public had the will when witness first saw it, and that the notary laid the will on the table; that at that time Mrs. Rankin was sitting in the room, and the notary asked her if she knew what was in the will, and if she had read it, and whether it was all right, and she told the notary that she knew everything there was in there, and that it was all satisfactory. He did not remember what was done with the will after it was signed, he did not see it any more until he made the affidavit as a witness after Mrs. Rankin's death; that he signed the will in the presence of Bartholow, and was there when Bartholow signed it as a witness; that Mrs. Rankin was over twenty-one years of age and of sound mind when she signed it.

Having made this formal proof of the execution of the will the defendant offered and read in evidence the said will, which is in words and figures as follows:

"I, Cecilia A. Rankin, being of sound and disposing memory, do make and declare and publish this my last will and testament, hereby revoking and annulling all former wills by me made, as follows:

"1st. I order and direct that all of my just debts be paid with convenient speed out of my personal estate if possible.

⁶⁸⁷ "2nd. I give, bequeath and devise unto my son, Eugene C. Rankin, all of lots eight, nine, ten, eleven and twelve in block three, known as the 'Rankin House,' in De Soto, Missouri, being the same left me by my husband, L. J. Rankin, deceased. Also the silverware and all the books and pictures of every description and kind wherever located, and also one-half interest in all my personal property and real estate of whatever nature, in my possession at the time of my death.

"3rd. I give and bequeath unto my son, Charles T. Rankin, one-fourth of my estate, both real and personal, provided that he shall be frugal and saving from this date on; otherwise, he shall receive one thousand dollars and no more, and should he be dead at or before my death, the above to go to my other

children, excepting one dollar each to Mattie and L. J. Rankin, Jr., children of the above named Charles T. Rankin.

"4th. I give and bequeath unto my daughter, Maggie C. Dausman, one thousand five hundred dollars worth of real estate or in cash, at the option of the other heirs. She to have and to hold the same as her separate property, and her husband, W. H. Dausman, is not to have any right, title or interest or curtesy therein, but this to be hers, separate and distinct, as though she was single and unmarried, and at her death the same to go to her children with the same restriction as above set forth.

"5th. The remainder of my estate, if there be any, I give and bequeath to my son, Eugene C. Rankin.

"6th. I hereby appoint my son, Eugene C. Rankin, my executor, without bond, of this my last will and testament.

"Dated this 17th day of August, 1899.

"CECELIA A. RANKIN.

"Signed and published and declared by the above Cecelia A. Rankin to be her last will and testament, in ^{ess} the presence of us, who, at her request, and in the presence of each other, and in her presence have subscribed our names.

"ED. L. FLETCHER.

"PERRY BARTHOLOW.

"State of Missouri,
City of St. Louis,—ss.

"On this 17th day of August, 1899, before me personally appeared Cecelia A. Rankin, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

"And the said Cecelia A. Rankin further declares to be a widow and unmarried.

"In testimony whereof, I have hereunto set my hand and affixed my seal at my office in the city of St. Louis, the day and year first above written.

"My term of office expires September 11, 1900.

"M. J. SEEMAN,

"Notary Public."

Thereupon the defendants rested their prima facie case.

The plaintiff then offered in evidence the inventory of Mrs. Rankin's estate made by her son, Eugene C. Rankin, from which it appears that she had real estate valued at about

eighteen thousand dollars and personal property at the value of three hundred and fifteen dollars.

Mrs. Maggie Dausman testified she was a daughter of L. J. Rankin and Mrs. Cecilia A. Rankin, and was living in Moberly, Missouri, and the wife of W. H. Dausman; in 1899, in August, she was living in De Soto. Her father had been dead about five years, and her mother died in April, 1901; that her mother kept house until witness married, and after that boarded; that at the time of her mother's death witness was living in Webster Groves; was present with her mother in her last sickness; was telegraphed for and came and stayed with her during her last sickness, which lasted about three weeks; her mother was seventy-eight ⁶⁸⁹ years old at the time of her death, and had been in poor health for years; that she took the death of her husband very hard, and her health was much worse after his death; that her mother had no business capacity, and she never knew her to transact any; that she had no idea of her estate, and had never had any estate until the death of her husband; that she did not know the value or the number of the houses she owned; that she was incapable of giving the list of her property to the assessor; that she did not know who her tenants were; she knew that she owned the Acme Hotel, the Grove and the old homestead property, but some of the little houses she did not remember at all; that the relation of Gene and her mother was very intimate; that he controlled her business, and she never did anything without consulting him; that her mother visited her and was very kind to her up to her father's death except the first two or three weeks after her marriage; that she was invited home by her mother, that she and her husband went, and that deceased seemed satisfied, and all the family treated her well except Eugene; he did not speak to her for eight years; that right after her father's death she noticed a change come over her mother toward herself, her visits were not so frequent, and she finally ceased visiting her entirely until she moved to De Soto; that there was never any trouble between them to cause this, but her mother gradually grew cold toward witness. During this time Eugene was her confidant; that for nineteen months before her mother's death she lived in Webster Groves, fourteen miles out from St. Louis, and that her mother never visited her there, though she was in her usual health and visited St. Louis a month or so at a time; that she visited her mother at De Soto for three days the

week before she was taken down with her fatal sickness; that her mother called Eugene to come in and see her, but he refused and did not see witness while she was ⁶⁹⁰ there; that she went home on Monday, and her mother was taken sick Friday. Eugene then sent for her and she came and remained until her death and funeral; that immediately after the funeral and while at the station Eugene did not speak to her or tell her good-by; that she told Eugene that she would like to give her Aunt Clara some of her mother's clothes, but he said, "Put them in the trunk and give me the key." My mother's watch and some silverware were in the trunk, the clothes and wearing apparel were her mother's, and witness was the only daughter. After her father's death she had a talk with her mother about a will she had made; she told witness the contents, and she said she had left my daughter a house and had left another daughter a house; that she left my daughter Cecilia her watch; that while they were taking the goods Mrs. Deadrick told Gene that he had his father's watch, that Mrs. Rankin intended her watch to go to Maggie's daughter Cecilia, but he said, "No, put it in the trunk"; that the witness had a family of five daughters; that when she moved to De Soto she moved into the old home place; that her mother, Gene and Charley had a talk with her and all said they wanted her to have that place, Charley said she was welcome to his interest, and they were to let her have the house without rent; that Gene charged her sixteen dollars per month, and deducted it out of her share of her father's estate; that just before Gene went to St. Louis witness and her mother were in his room at the Acme Hotel in De Soto and he produced a will which purported to have been made by him and handed it to the witness and said, "Read this," and she was reading it to herself and he said, "Read it aloud." It was admitted that the attorneys had notice to produce this will, but they did not have it. This will, as witness remembered it, stated that, "I, Eugene C. Rankin, being of sound mind, do will and bequeath to my mother, Cecilia A. Rankin, all of my possessions, knowing that she will make a proper disposition of them." Her ⁶⁹¹ mother was then seventy-six years old and Gene about forty-five and in good health; that he had always lived at home except a short time when he had positions in St. Louis; that for the last fifteen years he had not done anything that she could learn; she stated that the time that Gene showed her this will

of his was in the spring of 1899, and there were no witnesses to it.

Mrs. Lattie J. Pratt testified that she heard Mrs. Rankin say, "There was one thing sure, that when she died, Maggie's children would be well provided for." She said that two or three times just before she was taken sick, she said she did not want Will Dausman to get her money, and that what she did for Maggie she did not want Eugene to know; she was very forgetful, always had some one with her in going about the streets of De Soto, her business capacity was very poor, her objection to Mr. Dausman was not on account of his drinking, but Maggie's children increased too often; that that was her objection to him.

Otto Hermann testified that he knew Mrs. Rankin, and that he never knew her to do any business; that Gene managed her business; that she had valuable property on Main and Boyd streets in De Soto, stores, hotel and residence property; that he never heard of her transacting any business in regard to them.

Mr. Blackman testified, on part of plaintiff, that he lived in De Soto and had a piece of property belonging to Mrs. Rankin for sale in 1899, and sold it to Mr. Shuman for six hundred and fifty dollars; had an office with Charles Rankin, and he placed it in his hands for sale. The deal was closed, but Mrs. Rankin did not make this deed; that Gene objected to it being sold, and Mrs. Rankin asked him to see Gene and ask him to allow her to sign the deed; that he asked Gene why he did not allow his mother to sign the deed, and Gene said he was going to sell it himself, thought he could sell it for more money, but witness said, "You had better let your mother sign the deed," and Gene said he would. Gene ⁶⁹² generally made out the tax list for her property and had charge of her papers.

Dr. James Deadrick testified for the plaintiff; that he married a niece of Mrs. Rankin, knew her quite intimately, did not think she had business capacity, she was a woman of strong prejudices; she did not like Will Dausman, the husband of her daughter.

Charles T. Rankin testified that he did not learn of the contents of the present will until the day the partition was served on him in this case; that he knew of another will besides this, one which had previously been made by his mother; that that will was in his mother's possession. He was asked

to state the provisions of that will, to which defendant objected. E. C. Rankin was then called for the plaintiff and asked if he had in his possession a will purported to have been executed by Cecilia A. Rankin prior to the will in controversy, and he said that he had not, that it had been destroyed; that that will was prepared in 1897. Thereupon Charles T. Rankin was recalled and testified that under the provisions of that former will his mother made all the children equal; that she gave to his sister's oldest daughter a watch and house and lot, and to Nettie, the second daughter, some property; that when he heard of this will being contested he thought it was the will that his mother had told him she had made, and was surprised at his sister contesting it. Mr. Williams, the attorney, wrote him a letter and told him about the suit having been brought against himself and Eugene, and of his having employed Mr. Frazier to represent him, and that he wrote Frazier and told him to file an answer; at that time he had given his brother Gene a deed for part of the property; that his mother did not attend to business after his father's death. Witness attended to it and filed all the papers in her statement of his father's estate; that she did not do anything in controlling the property; she gave brother Gene the power of an attorney to attend to her business; she would do nothing ⁶⁹³ without consulting Gene, would not sign papers without consulting him. He also related the circumstances about Captain Blackman selling the lot, and stated that his mother did finally sign a second deed, and that witness got some money from the German-American Bank, he had a lawsuit at Hillsboro, and it took nearly all of his money, and his mother indorsed the note for him at the bank, but said she did not want Gene to know about it, for he would raise a row; that she did business with the People's Bank of De Soto; the money was borrowed from the German-American Bank. Mrs. Rankin's property consisted of some twelve houses, most of which were rented, the rental amounting to about one hundred and seventy-five dollars to two hundred dollars per month. Gene rented the property and collected the rents; witness did not think that his mother knew the value or extent of her property. Part of the time witness attended to the property and afterward his brother did. On one occasion when Gene, his mother and the witness were present, and his sister was thinking of moving to De Soto, witness told her he would give her his interest

in the homestead property, and his mother said she would give her hers, and his mother insisted on Maggie moving down to De Soto; that Gene said, "We will see about it." Witness owned one-fourth interest in the property. Maggie came down and lived there awhile, but the deed was not made to her; that he was present at the last sickness of his mother; his sister, Mrs. Dausman, was there attending to his mother for several weeks before she died; whenever she was out of the room her mother wanted her back again. On cross-examination he was examined as follows:

"Q. You stated awhile ago that your mother had made a prior will. A. Yes, sir.

"Q. Who drew it? A. I think Mr. Williams.

"Q. Who were the witnesses to that will? A. I cannot remember.

"Q. What was the date of it? A. I do not know as to the date.

"Q. What was the manner of the disposition of the property under the will? A. She ~~694~~ left it as I said; we were to share and share alike.

"Q. Did you ever talk with your mother about the execution of that will? A. Yes, sir, at different places, and she has talked to me about it at my office.

"Q. Is not it a fact that Gene was to get the Rankin house? A. No, sir.

"Q. Have you not heard your mother say a number of times that she wanted Gene to have that hotel property? A. No, sir, she said she wanted to do as my father had done, make us all equal."

At the close of the plaintiff's evidence in chief the defendants asked an instruction in the nature of a demurrer to the testimony, which was by the court overruled. The defendants then called Dr. W. H. Farrar, a physician who had lived in De Soto since 1878, and was the family physician of Mrs. Rankin in her lifetime. He testified that she was a very strong-minded woman and very intelligent; that during the year 1899 up to her death he considered her mind active and strong. On cross-examination he stated that he did not know of her transacting business; that she was a feeble woman physically, and a woman of strong prejudices; that she would not be easy to turn against anyone, but if she made up her mind that way it would be hard to change her; she was very feeble before her husband's death, and when the body fails

the mind usually fails with it. Witness saw Mrs. Dausman waiting on her mother during her last illness; her mother seemed to have every confidence in her; Mrs. Dausman waited on her day and night.

Dr. Auerswald testified that he had known Mrs. Rankin since 1880, saw her a short time before her death; she was a strong-minded woman, and in his opinion capable of disposing of her property. He stated that he had been at Mrs. Rankin's house a number of times when her husband was sick, and as a rule a person seventy years old, feeble in body and of strong prejudices, was susceptible to the influence of others.

⁶⁹⁵ Mr. Manheimer and his wife testified also that Mrs. Rankin was a woman of strong mind and very decided.

Mr. Crow testified that he had known her intimately for about eleven years, and in 1898 had a conversation with her; she came into witness' office and asked where Gene was; witness said, "I suppose he has gone out to get a drink," and she said, "No, he has not," and said as long as Gene stayed there and took care of her he should have charge of her property, and that if he would get married she would will it all to him. He thought she was a woman of sound mind, and very intelligent. On cross-examination he stated that he was a friend of Gene's, they had hunted together many times, and had an office in the same building. Gene Rankin had the management of Mrs. Rankin's property, so far as he knew, and she had utmost confidence in him.

Dr. Bryan testified he had known Mrs. Rankin for twenty years and she visited his family; she was a woman of over average intelligence; she told him in 1898 that she was going to leave her property to Gene, because he would take care of it and would not drink it up, and as he was taking care of her he was entitled to it; that Charley had had enough, had had his share and drank it up. On cross-examination he stated this conversation was in consequence of Gene's ceasing to drink, and occurred at his store; that he had treated Gene for pneumonia and for the liquor habit at the request of his mother.

Mr. Park also testified that she was a bright woman, of excellent character. Witness on one occasion made a remark that he believed in people holding on to their property as long as they lived and not letting their children

have it, but she said it will be all right if you give it to a party that would take care of it.

L. J. Deering had known Mrs. Rankin for several years; she had boarded with him about two months in ⁶⁹⁶ 1899. She said in his presence on one occasion if Gene outlived her he would have all she had; that Charley had sold his interest in the real estate, and her daughter's husband had lived off of her estate long enough; that she would leave all she had to Gene.

Mrs. Hunter testified to about the same effect as did Mrs. Deering and Mrs. Fletcher.

The defendants then called Eugene C. Rankin as witness for himself. He testified his father died in 1897 and his estate was settled in 1899; that he and his mother bought the interest of his brother Charles in the real estate; that they also wanted to buy Mrs. Dausman's interest in partnership, but that on July 31, 1900, Mrs. Dausman sold her interest to George Mahn; that Mr. Joseph G. Williams, one of the attorneys in and present at the trial of this case, drew the will which his mother made in June, 1899; that the will was changed at his mother's special request; that under that will he was to receive the Rankin hotel property and one-fourth of the estate, and his brother one-fourth provided he would live a frugal life and stop drinking, and his sister was to receive one thousand dollars in money and a piece of property valued at four or five hundred dollars free from the control of her husband; that that is the only difference between the old and the new will; that after the new will was made she remained in St. Louis, and had been there some two months before, at 2846 Lafayette avenue, at Mrs. Honey's boarding-house; that he saw her about every two weeks while she was there; that when she returned to De Soto she went to Mrs. Hunter's to board. On cross-examination he said he did not know the day of the month on which the June will was made; that it was destroyed at his mother's request after she had made her last will; that he destroyed it as soon as he got home from St. Louis; that he thought the last will was written on the 15th of August, 1899.

⁶⁹⁷ The following questions and answers were then propounded to him by plaintiff's counsel:

"Q. Did she write to you? A. Yes, sir.

"Q. If she wrote to you, have you those letters? A. I think I have them at home.

"Q. Did she indicate to you how she wanted that will changed in those letters? A. She told me to come up and she would explain it.

"Q. When did you go up? A. The day the will was signed.

"Q. On what train? A. The Arcadia.

"Q. Did you have a draft of the will with you? A. Yes, sir, I made a copy of the old will.

"Q. That is the will? A. Yes, sir.

"Q. Now this will reads, 'I give and bequeath to my son, Eugene C. Rankin, all of lots 8, 9, 10, 11 and 12 in block 3, known as the Rankin house, in De Soto, Missouri, being left me by my husband, L. J. Rankin'? A. Yes, sir.

"Q. 'Also all the silverware, books and furniture and also one-half interest in all my personal property at the time of my death?' A. Yes, sir, that is a correct copy of the June will.

"Q. And the third clause is, 'I give and bequeath to my son, Charles T. Rankin, one-fourth of my estate, both personal and real, provided he shall be frugal and saving from this day on, otherwise, he shall receive one thousand dollars and no more, and should he be dead at or before my death the above to go to my other children, excepting one dollar each to Mattie and L. J. Rankin, Jr., children of the above Charles T. Rankin'; is that the same? A. Yes, sir.

"Q. The fourth clause reads this way: 'I give and bequeath unto my daughter, Maggie Dausman, fifteen hundred dollars worth of real estate or in cash at the option of the other heirs. She to have and to hold the same as her separate property and her husband, W. L. Dausman, is not to have any right, title, interest or curtesy therein, but this is to be hers separate and distinct as though she were single and unmarried and at her death the same to go to her children with the same restrictions as above set forth.' What is the difference between this clause and the June will? A. She was to ⁶⁹⁸ get one thousand dollars and a house and lot up on the hill, I think well worth four hundred and fifty dollars. And in order to avoid controversy she was to have fifteen hundred dollars or that amount of

property. The fifth clause of this will and the June will are just the same."

He further testified that he never talked to his mother about making a will; that he and his mother were buying this property together, that he represented himself and his mother in the transaction.

Defendant also offered in evidence a deed from Charles Rankin to Mrs. Rankin and Eugene Rankin for his one-fourth interest in his father's estate, and another executed April 23, 1901, by which Charles Rankin conveyed to Eugene Rankin all his interest under the will of Cecilia Rankin to certain property therein described. Defendant also offered in evidence the last will of Louis J. Rankin, by which he gave to his widow Cecilia Rankin certain lots in De Soto, and divided the balance of his estate in four equal parts between his widow and his three children. It was admitted that if Joseph A. Hammond were present he would testify that he copied the will executed in June by Cecilia A. Rankin on a typewriter; that the will was written by Joseph G. Williams, and contained the exact words of the will now in contest with the exception that it gave Mrs. Dausman one thousand dollars in cash and a house and lot in the city of De Soto.

At the close of the evidence the court gave the following instructions for the plaintiff:

"1. The court instructs you that the question you are to determine in this case is whether or not the paper writing offered in evidence dated August 17, 1899, as the last will and testament of Cecilia A. Rankin, was the result of undue influence used upon said Cecilia A. Rankin by Eugene Rankin in procuring the execution of said paper writing; and if you find from the evidence that said paper writing was the result of undue influence exercised by Eugene C. Rankin over Cecilia A. Rankin, then you will find your verdict against ~~699~~ the will and in favor of the plaintiff, although you may believe from the evidence that she signed it as such and the witnesses attested it as such.

"2. By the term 'undue influence,' as used in these instructions, is meant the exercise of such power and influence by one person over the mind of another as would result in the subjugation of the mind of the one to that of the other and the complete subjugation of the will of the one for the will of the other in the matter in which

they were engaged; and if the jury believe from the evidence in the case that by reason of the weak and feeble mind of said Cecilia A. Rankin, said Eugene C. Rankin was enabled to, and did, exert such an influence over the mind of said Cecelia A. Rankin as to substitute his will and wishes for that of Cecilia A. Rankin, in the disposition of her property by will, and if the signing of said paper by said Cecelia A. Rankin was induced and brought about by the exercise of the influence, then the jury will find that said paper is not the will of said deceased Cecelia A. Rankin, notwithstanding that said Cecelia A. was at the time said paper was signed and attested, of sound mind and disposing memory.

"3. The court instructs the jury that it is not necessary that undue influence should be proved by direct and positive testimony; but the same may be proven by facts and circumstances; and, in passing on the question as to whether the signing of the paper in question by Cecilia A. Rankin was induced by influence on the part of Eugene C. Rankin, it is proper for the jury to take into consideration the terms of the will itself; the relation of Cecelia A. Rankin to the plaintiff, as shown by the evidence; her age, mental and physical condition, as shown by the evidence; her relation to and feeling toward the defendants, Charles T. Rankin and Eugene C. Rankin, as shown by the evidence, as well as other facts and circumstances disclosed by the evidence in the case, and if from all the facts and circumstances ⁷⁰⁰ the jury believe that the signing of the paper in controversy by said Cecelia A. Rankin was induced and brought about by an undue influence on the part of said Eugene C. Rankin, as an undue influence has been defined in these instructions, then it is the duty of the jury to find that the said paper is not the will of the said Cecelia A. Rankin."

To the giving of which instructions the defendant excepted at the time.

The court, at the instance of defendant, gave to the jury the following instructions:

"2. The court instructs the jury that there is no evidence that Cecelia A. Rankin was, at the time she made the will, of unsound mind and incapable of making said will, and you cannot find against the will produced on that issue.

“3. The court instructs the jury that there is no evidence as to the charge of fraud on the part of Eugene C. Rankin, and you cannot find against the will produced on that issue.

“4. The court instructs the jury that Cecelia A. Rankin had the right to will the property to anyone she desired to and even had a right to make an unreasonable, unjust and injudicious will, and you have no right to alter the disposition of her property simply because you may think that Cecelia A. Rankin did not do justice to her family.

“5. The court instructs the jury that by undue influence is meant such influence as amounts to force, coercion or over-persuasion which destroys the free agency and will power of the testator.

“6. The court instructs the jury that Cecelia A. Rankin had the right to dispose of her property by will in such manner and to such persons as she deemed proper and the beneficiaries in such will are not required to account for or explain such disposition, and if you find that said Cecelia A. Rankin did execute the instrument on the seventeenth day of August, 1899, then the ⁷⁰¹ plaintiff can only avoid such will by showing to your satisfaction by a preponderance or greater weight of evidence that said will was procured by undue influence on the part of Eugene C. Rankin.

“7. The court instructs the jury that any degree of influence over another acquired by kindness and attention can never constitute undue influence within the meaning of the law, and although the jury may believe from the evidence that the deceased Cecelia A. Rankin, in making her will, was influenced by any person or persons, still if the jury further believe from the evidence that the influence which was exerted was only such as was gained over the deceased, Cecelia A. Rankin, by kindness and friendly attention to her and not such as to destroy her free agency and make the will not hers but that of such person, then such influence cannot be regarded in law as undue influence and a verdict on this ground should be in favor of the will.

“8. The court instructs the jury that undue influence as defined in these instructions, sufficient to set aside the will in question, must be an influence exerted and used over the mind of the said Cecelia A. Rankin prior to the exe-

cuton of said will, and at the time of its execution, and unless you find that such undue influence was wielded over her at the time of the execution of said instrument, the will in question will be the last will of the said Cecelia A. Rankin."

1. The instructions of the court reduced the issues in this case to one, to wit, whether the paper writing propounded as the will of Mrs. Rankin was the result of undue influence exerted upon her by her son, Eugene C. Rankin. The court by a peremptory instruction told the jury there was no evidence that Cecelia A. Rankin was, at the time she made the will, of unsound mind and incapable of making said will, and therefore they could not find against the will on that issue. This instruction renders it wholly unnecessary on this appeal to discuss whether Mrs. Rankin had sufficient testamentary capacity ⁷⁰² to make a valid will. The one question, then, which we are called upon at this time to determine is whether there is sufficient evidence to sustain the verdict of the jury which declared that the paper writing propounded as such was not the last will and testament of Mrs. Rankin. Counsel for appellant assigns as error the refusal of the circuit court to give instructions numbered 13 and 9 as prayed by the defendant, which were as follows:

"9. The court instructs the jury that there is no evidence as to the charge of undue influence on the part of Eugene C. Rankin, and that you cannot find against the will produced on that issue."

"13. The court instructs the jury that if you believe and find from the evidence that Cecelia A. Rankin signed the will in the manner testified by the subscribing witnesses and that at the time of such signing she had sufficient understanding and intelligence to understand what disposition she was making of her property, the nature and extent of her property, and to whom she was giving it, then the jury will find that she had sufficient capacity to make a will, and that said will is the last will and testament of said Cecelia A. Rankin, unless you further find from the testimony that the making and signing of said will was procured by defendant, Eugene C. Rankin, by undue influence which amounted to a moral force or coercion, destroying the free agency of Cecelia A. Rankin; and in such cases the burden is on the plaintiff to show by

a preponderance of the evidence the existence of such undue influence."

It is apparent that the court did not err in refusing instruction 9, if in fact there was evidence which justified the court in submitting the issue to the jury at all, and instruction 13 was devoted mainly to the question of testamentary capacity which was taken from the jury by a peremptory instruction, and so much of it as referred to undue influence was fully covered and included in instructions 5, 6, 7 and 8 given at the request of ⁷⁰³ defendant, so that, as already said, the only duty devolving upon us at this time is to determine whether there was sufficient evidence to take the case to the jury.

There is nothing novel in a will contest. It is a class of litigation with which this court is very familiar. There is no conflict in opinion as to what constitutes undue influence such as will vitiate a will, or rather a paper writing propounded as such.

Again and again it has been adjudged by this court that influence in order to be undue, within the meaning of the law, which would make it sufficient to vitiate a will, must be such as amounts to over-persuasion, and coercion or force, destroying the free agency and will power of the testator. It must not be merely the influence of affection or attachment, nor the result of a desire on the part of the testator of gratifying the wishes of one beloved, respected and trusted by the testator: *Boyse v. Rossborough*, 6 H. L. Cas. 2, 29 L. J. Ch. 256, 3 Jur., N. S., 373, 5 Week. Rep. 414; *Jackson v. Hardin*, 83 Mo. 185; *Carl v. Gabel*, 120 Mo. 283, 25 S. W. 214; *McFadin v. Catron*, 138 Mo. 218, 38 S. W. 952, 39 S. W. 771.

The burden of proof is on the party alleging it, but like every other question of fraud or bad faith it is a question of fact, and can rarely be proved by direct or positive evidence but may be established by facts and circumstances, and upon the ground of public policy the doctrine of courts of equity has been adopted by the courts of law in these contests, and where a devise or legacy has been given by a testator to one occupying a fiduciary relation to him, "proof of the existence of such a relation raises the presumption of undue influence, which will be fatal to the bequest unless rebutted by proof of free deliberation and spontaneity on the part of the testator, and good

faith on the part of the devisee or legatee": 1 Woerner's American Law of Administration, 2d ed., sec. 32; Garvin v. Williams, 44 Mo. 465, 100 Am. Dec. 314; Carl v. Gabel, 120 Mo. 297, 25 S. W. 214.

In Gay v. Gillilan, 92 Mo. 250, 1 Am. St. Rep. 712, 5 S. W. 7, this last-named doctrine was extended to embrace the case of a son who by ⁷⁰⁴ his conduct had placed the mind of his aged father in complete subjection to his demands.

An examination of the instructions will show that the trial court applied the foregoing tests to the facts of this case, and the only ground upon which its judgment can be reversed is that the facts in evidence did not justify its submission to the jury, because, as defendant insists, there was no evidence of undue influence.

Proceeding, then, to an examination of the facts in evidence, we must respond to this insistence. Mrs. Cecelia A. Rankin, the testatrix, at the time of the execution of the will in contest, was about seventy-seven years of age; she had been frail and in feeble physical health for a number of years; she had three children, two sons and a daughter; the sons were both unmarried at the time. Her permanent home for many years had been at De Soto, in this state. The will in contest was made August 17, 1899. She died in April, 1901. The evidence quite conclusively shows that in her husband's lifetime Mrs. Rankin had nothing to do with business affairs. L. J. Rankin, her husband, died in 1897, and his estate was finally settled in 1899. After the death of her husband the business affairs of the testatrix, such as the renting and collecting of rents, the payment of taxes, and the sale of property, were attended to by her two sons, Charles and Eugene; for awhile, by Charles, but for some time prior to the execution of the will, almost wholly, if not entirely so, by her son Eugene. Sometime after her husband's death in the years 1897, 1898 or 1899 (and there is a conflict as to the date) Mrs. Rankin made her will. It was drawn by Joseph G. Williams, a member of the Jefferson county bar. What the provisions of that will were was one of the disputed facts in the case. Charles Rankin testified that by that will the three children were given equal shares, but there were some special legacies to Mrs. Dausman's two oldest daughters. That will was destroyed ⁷⁰⁵ by Eugene Rankin, as he as-

serts, by the direction of his mother after the will in contest was made or executed. Eugene Rankin testifies that this former will was exactly like the one contested, save and except it gave Mrs. Dausman fifteen hundred dollars in money or land at the option of the other heirs, instead of one thousand dollars in money and a lot worth four hundred dollars or five hundred dollars. He testified that his mother wrote him to come to St. Louis where she was visiting at the time, in regard to changing her first will, which he said was executed in June, 1899; that when he came up she would explain the changes to him; that he went up to St. Louis from De Soto the day the will in contest was made. He was asked if he had a draft of the will with him, and he answered, "Yes, sir, I made a copy of the old will." He is corroborated on this point by Bartholow who attested the will in contest, who says, that Eugene wrote him that he would be in St. Louis and wanted to see him; that prior to going out to Mrs. Rankin's boarding-house, Eugene came to see him, Bartholow, and had a rough draft of the will his mother was to execute and at Bartholow's suggestion had Mr. Jenkins, a stenographer in the Laclede Building, copy it on a typewriter; that Jenkins was Bartholow's typewriter. It is made entirely clear from the evidence of both Eugene Rankin and Bartholow that there was no conference or explanation of any kind by Mrs. Rankin with Eugene Rankin of the changes she desired made in her will prior to the time the will in contest was prepared for her signature, but it was written by Eugene Rankin himself before he came to St. Louis and was copied by Jenkins. It is true he says the will in contest corresponded with what she told him she wanted to give Mrs. Dausman, but when she told him this he does not say, and though he claims to have had letters from his mother making a request for a change in her will and still had them, he did not produce them.

His explanation of his mother's desire for a change ⁷⁰⁶ in the will was that it "was to avoid complications with Mrs. Dausman," but by the new will Mrs. Dausman got exactly the same amount of property, fifteen hundred dollars, that she would have received under the June will, according to his testimony, the only difference being that under the June will she got a little house worth four hundred dollars or five hundred dollars instead of five hundred dol-

lars in money. What complication was avoided by this slight and immaterial change is hard to imagine. If the jury believed Charles Rankin there was a much stronger motive for this change in his mother's will. By her first will she made her three children equal, but by this change Eugene got the lion's share of this valuable estate, and his sister, only fifteen hundred dollars' worth of property.

At this time Eugene held a power of attorney from his mother to control all of her business affairs; he was estranged from his sister; that he exercised a strong influence over his mother is evidenced by the fact that when, in 1899, her agent had made what he thought was an advantageous sale of unproductive property, and Charles, her other son, had advised the sale, and the deed was prepared for her to execute, she declined to do so unless Eugene would consent and he refused to let her sign it, and she appealed to Mr. Blackman, to persuade Eugene to let her make the deed, and it was only after Blackman had induced Eugene to consent to it that she did sell the property.

We think the evidence tended strongly to prove that Eugene Rankin before and at the time the will in contest was written had acquired the control of his mother's business and bore a fiduciary relation to her; that he had obtained a strong control of her mind as to the disposition of her property and there was evidence that when she desired to aid the other two children she sought to keep Eugene from knowing it lest he should raise a disturbance about it. There was evidence that Mrs. Rankin had become possessed of the notion that Dausman, her son in law, was living off of her estate, ⁷⁰⁷ when in fact there was not a word of evidence that such was a fact. On the contrary, Mrs. Dausman had received from her father's estate one-fourth of the personal estate and real estate, which she sold in 1901 for four thousand two hundred dollars to George Mahn. When it is considered that Eugene was so embittered toward his only sister that for eight years he would not speak to her and exhibited this unnatural disposition at the time his mother died, and the close personal and financial relation which he bore to his mother and the known influence he was exerting in her affairs, and her feeble health and old age, it cannot be said that the triers of the facts could not properly have attributed

Mrs. Rankin's perverted idea as to Dausman living off her estate to the suggestion of her son Eugene. Under these circumstances a will drawn by Mr. Williams was destroyed by Eugene, and the will in contest drawn by him by which he received the bulk of an estate amounting to over eighteen thousand dollars, and his sister, who had faithfully fulfilled all the obligations of a dutiful daughter, was cut off with fifteen hundred dollars. That it was a most unnatural division of her estate by Mrs. Rankin goes without saying. When we look for a reason for this unnatural preference, it cannot be found in any particular service rendered by Eugene, or any personal superiority over his brother and sister. His intimate friend, Bartholow, testified that Gene had been drunk as often as sober for thirty years past, and it appears elsewhere in the record that his mother had had him treated for the liquor habit. It does, indeed, seem that Mrs. Rankin was displeased at first with her daughter's marriage, but soon forgave her, and their relations were affectionate and natural until Eugene obtained control of his mother's affairs. While in the absence of evidence of undue influence, discrimination in favor of one child over another is no evidence of undue influence, when, as in this case, that influence does appear and the favored child prepares a will by which he obtains the bulk of a parent's estate ⁷⁰⁸ to the detriment of his brothers and sisters, the burden is on him to show that the will was the result of deliberation and spontaneity on the part of the testator and absolute good faith on the part of the devisee or legatee, and we think the perfunctory part played by Mrs. Rankin in the execution of the will in contest and the dominating influence and the activity of Eugene Rankin in preparing the will in his mother's absence, the selection of the witnesses, and the great disproportion which he takes under such a will over his sister and brother, fell far short of that disinterested good faith and fairness which one in his position and bearing the relation which he did to his aged and feeble mother is required to show before he can profit by an instrument prepared by himself. We have read this record carefully and while we adhere to the conservative rulings of this court which scrupulously guard the right of the citizen to dispose of his property by will as he sees fit, we have never said that a will obtained by undue influence was a

valid disposition of one's property, nor have we relaxed the wholesome doctrine that one occupying a fiduciary relation to a testator has the burden of rebutting the presumption that a legacy in his behalf was the result of undue influence and was the free act of the testator.

Our conclusion is that there was no error in the instructions; that the cause was fairly submitted to the jury, and that there was sufficient evidence upon which to base their verdict that the paper writing propounded as the will of Mrs. Cecelia A. Rankin was not in fact her last will and testament, and that the judgment must be and is affirmed.

Burgess, P. J., and Fox, J., concur.

Undue Influence, to Avoid a Will, must be such as to destroy the free agency of the testator at the time of the making of the testament: *Englert v. Englert*, 198 Pa. St. 326, 82 Am. St. Rep. 808; *In re Shell's Estate*, 28 Colo. 167, 89 Am. St. Rep. 181; *In re Kaufman*, 117 Cal. 288, 59 Am. St. Rep. 179. It is not true that any influence exercised by a legatee over the testator inducing him to make a will is an undue influence authorizing the setting aside of the will: *Bacon v. Bacon*, 181 Mass. 18, 92 Am. St. Rep. 397. Mere argument or solicitation addressed to the judgment or affections of the testator does not amount to undue influence: *Knox v. Knox*, 95 Ala. 495, 36 Am. St. Rep. 235; *Englert v. Englert*, 198 Pa. St. 326, 82 Am. St. Rep. 808. Nor are influences arising from friendship and affection necessarily undue: *In re Hess' Will*, 48 Minn. 504, 31 Am. St. Rep. 665; *Goodbar v. Lidikey*, 136 Ind. 1, 43 Am. St. Rep. 296; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33. Generally speaking, undue influence in the execution of a will is never presumed: *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828; *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22; *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 604. It will not be inferred merely from motive and opportunity: *In re Shell's Estate*, 28 Colo. 167, 89 Am. St. Rep. 181; *In re Hess' Will*, 48 Minn. 504, 31 Am. St. Rep. 665; *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 604. It has been said, however, that when a confidential relation is shown to have existed between a testator and the recipient of his bounty, his influence is presumed to have induced the gift: *Maddox v. Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734. For a further consideration of the presumption of undue influence, see the monographic note to *Richmond's Appeal*, 21 Am. St. Rep. 94-104; and for a consideration of undue influence generally in the execution of wills, see the monographic note to *In re Hess' Will*, 31 Am. St. Rep. 670-691.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

PAXTON v. WOODWARD.

[31 Mont. 195, 78 Pac. 215.]

LIBEL.—To Publish of an Individual that He is a Common Liar, by a written charge which is untrue and unprivileged, is libelous per se. (p. 418.)

LIBEL.—In Arriving at the Sense in Which Defamatory Language is employed, it is proper to consider the cause and circumstances of its publication and the entire language used. (p. 419.)

LIBEL.—When an Imputation Complained of is a Conclusion from certain facts, a plea of justification which avers the existence of a state of facts warranting the inference of the charge is sufficient. (p. 419.)

LIBEL.—Colloquium and Innuendo.—When words are unequivocal in their meaning and obviously defamatory, it is not necessary to employ colloquium or innuendo to explain their application and meaning; but if words are of a doubtful significance, or derive their libelous character, not from their own intrinsic force, but from extraneous facts, it is necessary to allege the meaning intended, or set forth such extraneous facts by proper averments. (p. 420.)

LIBEL.—To Say of a School Teacher that he is "noted," though in an invidious sense, and, referring to a particular district, "has done more damage and less good than any other teacher," and, referring to his application for a position as teacher of its school, "this district knows when it has had enough, so it turned the gentleman down," does not impeach him in any of those qualities which are essentials of an accomplished teacher, and to falsely assail which is libelous per se. (p. 421.)

LIBEL.—The Existence of Malice is not Necessary, under the Montana statutes, to entitle the plaintiff in a libel case to recover. (p. 422.)

LIBEL.—The Presence or Absence of Malice becomes material, in an action for libel, only as a circumstance affording a basis for increasing or diminishing the amount of recovery, and in cases involving the defense of privileged communication. (p. 422.)

LIBEL.—If Malice is Wanting, only compensatory damages can be recovered in an action for libel; but if malice is present, exemplary damages may be added to the actual or compensatory damages. (p. 422.)

LIBEL.—Malice is an Inference of Fact which the jury may draw from a libelous publication alone. (p. 422.)

LIBEL.—Other Statements and Defamatory Charges made by the defendant in a libel suit, even though after the commencement of the action, which tend to evince a wish to annoy or injure the plaintiff, are admissible to prove malice, but not to afford a basis for extra compensation. (p. 423.)

LIBEL.—In an Action by a School Teacher for Libel, he may show, in order to prove malice, that after the publication of the defamatory language the defendants attempted to have his certificate to teach revoked, and that after the institution of the suit they threatened to secure the cancellation of his certificate. (p. 423.)

LIBEL.—The Defendant in a Libel Suit may be Interrogated with respect to his motive in using the language alleged to be libelous, and be permitted to explain certain of his statements, whether they are true and the source of his information as to their truth, when these facts are involved in the issues presented by the pleadings. (pp. 423, 424.)

INSTRUCTIONS.—If the Court Incorporates in its instructions to the jury the substance of those offered by the plaintiff, it is not error to refuse to adopt those submitted by him. (p. 424.)

INSTRUCTIONS.—The Practice of Setting Forth in instructions to juries a clear and concise statement of the nature of the case and the issues to be determined, is to be commended, and the instructions are not objectionable. (p. 424.)

LIBEL.—If There is No Suggestion in the Complaint in action for libel that the plaintiff was injured as an individual, but only in respect to his profession, the court may properly exclude from the jury all consideration of damage to him as an individual. (p. 424.)

LIBEL.—Presumption of Injury.—When a Publication is libelous per se, injury is presumed to result therefrom, affording ground for the allowance of at least nominal damages. (p. 425.)

LIBEL.—Jury as Judge of Law and Facts.—Although the constitution provides that the jury, under the direction of the court, shall determine the law and the facts in actions for libel, an erroneous instruction to the jury may warrant a reversal by the appellate court. (p. 427.)

John A. Luce, for the appellant.

Hartman & Hartman, for the respondent.

²⁰⁵ **LESLIE, J.** This is an action to recover damages for libel. A trial of the cause in the court below resulted in a verdict for the defendant. Plaintiff moved for a new trial, which was denied, and from the judgment and the order overruling said motion the plaintiff appeals.

²⁰⁶ The complaint embraces two separate counts, in each of which plaintiff claims damages in the sum of five thousand dollars. The first count is for the publication of a certain alleged false, malicious and unprivileged communication on July 13, 1901, in the "Avant Courier," a newspaper of gen-

eral circulation, which publication plaintiff alleges tended to and did injure him in respect to his profession of school teacher. The second count is for a certain other false, malicious and unprivileged publication in said newspaper of August 24, 1901. Answering each count, the defendant admits the publication of said two articles, denies they were false, malicious or unprivileged, or that they tended to or did injure plaintiff in his profession, or that he was injured in any sum whatever. For further answer to each count, the defendant, by affirmative averments, pleads the truth of the matter contained in said publications, and also pleads certain facts in mitigation, not necessary to enumerate. The plaintiff demurred to each defense of the answer upon the ground that the same did not state a defense. This demurrer was overruled, and plaintiff replied.

1. The court did not err in overruling the demurrer to the answer. It is proper to suggest at this time that the first count of the complaint states a cause of action. The article, as set forth in this count, is as follows:

“As to Paxton’s popularity as a teacher it can be illustrated by the fact that out of forty-five children in the district but four or five were attending when the superintendent visited the school last week. This is the only school Paxton has taught in the county, and for the good of the schools I hope it will be the last one. He taught one term in Jefferson and one in Madison county, and they want no more of him. The statements in the ‘Chronicle’ are known to be false here. We knew that Paxton was a man of many attainments, but did not know that he was a common liar before. As he has gone to the Crow reservation now he has probably found his level.”

Whatever may be said of other portions of the foregoing article, to publish, by a written charge, of an individual, that he is ²⁰⁷ a common liar is an imputation tending to expose such individual to hatred, contempt, ridicule or obloquy, or injure him in his occupation; and if untrue, and not privileged, is libelous per se, and actionable. Such is the very nearly universal conclusion of the courts where this question has been adjudicated. A collection of the cases relating to this subject may be found in 18 American and English Encyclopedia of Law, second edition, page 921. See, also, Townshend on Libel and Slander, section 177.

But returning to the question presented by the demurrer, in the construction of language, regard is to be had to the words employed, and the meaning which, under all the circumstances of their publication, may be presumed to have been conveyed to those to whom the publication is made. While the written charge, "We knew that Paxton was a man of many attainments, but did not know that he was a common liar before," is in its nature libelous per se, and needs no colloquium or innuendo to illustrate its application or meaning, and the vice imputed to plaintiff by the words standing alone is unqualified and as broad as language can make it, yet if the defamatory language is connected with other language which limits or affects its meaning, or might tend to mitigate the damage, its construction must be in relation to such other language, and in arriving at the sense in which the language is employed it is proper to consider the cause and circumstances of its publication and the entire language used. It is apparent on its face that the publication in question was a part of an article published in response, in part at least, to certain statements contained in the "Chronicle." The matter set forth in the answer, upon which defendant relies for justification, is the history of a controversy which continued for some time between the plaintiff and the defendant, and the publication in question was a part of one of the articles constituting this controversy. The defendant alleges that the charge above referred to, implying a want of veracity in plaintiff, was limited in its meaning and application to certain statements previously published in the 'Bozeman Chronicle' at the instance of plaintiff, and not otherwise, and that such statements were ²⁰⁸ untrue. He also pleads facts upon which is based the alleged truth of the other statements contained in said publication. The answer in this respect presented an issue as to the truth of the statements of the publication, upon which defendant was entitled to be heard, and amply meets the requirements of the rule urged by counsel for appellant: "When the imputation complained of is a conclusion from certain facts, the plea of justification must aver the existence of a state of facts which will warrant the inference of the charge": Newell on Defamation, Slander and Libel, p. 652.

2. At the trial defendant objected to the introduction of any evidence as to plaintiff's second cause of action upon the ground that the publication was not libelous per se, and that

no special damages were alleged. The objection was sustained, and plaintiff excepted. Plaintiff's second cause of action is based upon the publication of August 24, 1901, heretofore referred to. The allegations are, in substance, that plaintiff is a school teacher, following that profession; that the article referred to was of and concerning him in his profession, occupation and business as such school teacher, and referred to his application for the position as teacher in the public school at Willow Creek, Gallatin county; that the said publication was false, malicious and unprivileged, and tended to and did injure him in his profession and occupation as a school teacher, to his damage in the sum of five thousand dollars. The article is set forth in the complaint, and is as follows:

"There were a number of applicants for the school, among them being the noted Paxton, who has done more damage and less good than any teacher we have ever had. This district knows when it has had enough, so it turned the gentleman down. A Miss Evans has been offered the position of teacher and we hope soon to have a good school running."

In this count of the complaint there is no colloquium, other than as stated above. There is no innuendo at all, and no allegation of special damages. The only damage claimed is that ²⁰⁹ sustained by plaintiff in his occupation and profession of school teacher, thus limiting the right of recovery, if any, to such general damages as were sustained in the special relation named. When the publication is libelous per se, the plaintiff may recover general damages without allegation or proof of special damages. In actions of this character "it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff": Code Civ. Proc., sec. 751. But in other respects the rules of common-law pleading remain unaltered.

In *Harris v. Zanone*, 93 Cal. 65, 28 Pac. 845, in construing a similar statute, the supreme court says: "If the words used are not libelous in themselves, or if they have some occult meaning or local signification, and require proof to determine their meaning or to show that they are libelous, or if they are words in a foreign language, it is necessary to make such allegation of their meaning as will show them to be ac-

tionable, and by averment 'to ascertain that to the court which is generally or doubtfully expressed': *Van Vechten v. Hopkins*, 5 Johns. 220, 4 Am. Dec. 359. The statute dispenses with them (that is, the colloquium and innuendo) only so far as they show that the defamatory words applied to the plaintiff, and goes no further. "The averments necessary in common-law pleading to show the meaning of the words must still be made"—citing authorities.

When the words are unequivocal in their import, and obviously defamatory, it is not necessary to employ colloquium or innuendo to explain their application and meaning; but if the words be of doubtful significance, or derive their libelous character not from their own intrinsic force, but from extraneous facts, it is necessary to allege the meaning intended, or set forth such extraneous facts by proper averments: 13 Ency. of Pl. & Pr., 33, and cases cited. To say of a school teacher ²¹⁰ that he is "noted," though used in an invidious sense, and referring to a particular district, "has done more damage and less good than any other teacher," and referring to his application for a position as teacher of its school, "this district knows when it has had enough, so it turned the gentleman down," cannot be said to impeach him in any of those qualities which are essentials of an accomplished school teacher, and to falsely assail which it is slanderous or libelous per se. Says Mr. Newell: "It by no means follows that all words to the disparagement of an officer, professional man or trader will, for that reason, without proof of special damages, be actionable in themselves. Words, to be actionable on this ground, must touch the plaintiff in his office, profession or trade. They must be shown to have been spoken of the party in relation thereto, and to be such as would prejudice him therein. They must impeach either his skill or knowledge, or his official or professional conduct": *Newell on Slander and Libel*, p. 168, par. 2, p. 174, par. 7. The publication of August 24th does not disparage plaintiff in, or impute to him a lack of, any of the qualities or qualifications which are prerequisites to the due fulfillment of the duties of a school teacher. It does not appear on the face of the publication that the capacity or skill of the plaintiff as a school teacher, his scholarly attainments, or his professional conduct or integrity, were in any wise involved in the matters referred to, and the court properly withdrew from the jury all consideration of the second count of the complaint.

3. Plaintiff called defendant as a witness, and offered to prove by him that since the publication constituting the basis of the first cause of action defendant had tried to have revoked the certificate of plaintiff as a school teacher, to which offer objection was made and sustained, and plaintiff excepted. Other witnesses were called by plaintiff, by whom he offered to prove that defendant had stated to them, after the institution of this action, that he would take away the plaintiff's certificate, or words to that effect; to all of which objection was made and sustained, and plaintiff excepted. Plaintiff's assignments with ²¹¹ respect to these offers and the refusal of the court to allow the testimony introduced are Nos. 12, 13, 14, 15, 16, and may be discussed together.

Libel is defined by section 32 of the Civil Code of Montana as follows: "Libel is a false and unprivileged publication in writing, printing, picture, effigy or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Under this statute the existence of malice is not a necessary ingredient to entitle the plaintiff to recover such sum as will fairly compensate him for the injury sustained. It would present no obstacle to such recovery that the defendant, acting in good faith, had probable cause for belief, and at the time did believe the charge to be true, and was absolutely free from malice.

Two classes of damages may be recovered in actions for libel, to wit, actual damages and exemplary damages. The presence or absence of malice becomes material only as a circumstance affording a basis for increasing or diminishing the amount of recovery, and in cases involving the defense of privileged publication. The right to recover being shown, and the presence of malice wanting, compensatory damages can only be awarded; but join to such right of recovery the element of malice, and exemplary damages may be added to the actual or compensatory damages. Malice is an inference of fact which the jury may draw from the libelous publication alone: *Samuels v. Evening Mail Assn.*, 75 N. Y. 604; *Warner v. Press Pub. Co.*, 132 N. Y. 181, 30 N. E. 393; *Clements v. Maloney*, 55 Mo. 352; *Schmisseur v. Kreilich*, 92 Ill. 347; *Evening News Assn. v. Tryon*, 42 Mich. 549, 36 Am. Rep. 450, 4 N. W. 267.

The plaintiff may, if he elect to do so, rely solely upon the libelous character of the publication to show malice, but he is not limited to it. He may also call to his aid and make use of any extrinsic facts which tend to show the presence of malice. It is impossible to look into the mind, and interpret the motives ²¹² which prompt its action, and resort may therefore be had to acts and declarations, if any, emanating from the individual touching the same, and observance of his conduct and bearing in relation to the subject matter. While there is some conflict among the authorities as to the competency of statements and defamatory charges made after the commencement of the action, the better reasoning and decided weight of authority seem to favor the admissibility of other defamatory charges and of statements made by the defendant, even though after the commencement of the action, which may tend to evince a wish to vex, annoy or injure the plaintiff, but for the purpose only of proving malice, and not as affording a basis for extra compensation therefor. Some of the cases bearing upon this subject are: *Post Pub. Co. v. Hallam*, 59 Fed. 530, 8 C. C. A. 201; *Spolek Denni Hlasatel v. Hoffman*, 105 Ill. App. 170; *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 959; *Norris v. Elliott*, 39 Cal. 72; *Chamberlin v. Vance*, 51 Cal. 75; *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845; *Garrett v. Dickerson*, 19 Md. 418; *Fry v. Bennett*, 28 N. Y. 324; *Titus v. Sumner*, 44 N. Y. 266; *Robbins v. Fletcher*, 101 Mass. 115; *Noeninger v. Vogt*, 88 Mo. 589; *Bee Pub. Co. v. Shields (Neb.)*, 94 N. W. 1029; *Larrabee v. Minnesota T. Co.*, 36 Minn. 141, 30 N. W. 462; *Faxon v. Jones*, 176 Mass. 206, 57 N. E. 359; *Ward v. Dick*, 47 Conn. 300, 36 Am. Rep. 75; *Davis v. Starrett*, 97 Me. 568, 55 Atl. 516.

The plaintiff should have been permitted to show the making by defendant of threats, if any, to secure the cancellation of his certificate entitling him to teach in the public schools.

4. In assignments of error Nos. 18, 19, 20 and 21 appellant complains of the action of the court in overruling plaintiff's objection to certain questions asked defendant with respect to his motives in using certain language in the articles alleged to be libelous, and in permitting him to explain certain statements therein, and whether certain statements made by him were true, and as to the source of his information with respect to the truth of certain statements. These were some of the

facts involved ²¹³ in the issues presented by the pleadings. and there was no error in these rulings.

5. Error is assigned for the refusal of the court to give certain instructions proposed by the plaintiff. In the instructions which were given to the jury, the court incorporated the substance of those offered by plaintiff, and it was not error to refuse to adopt those submitted by plaintiff: *Territory v. Pendry*, 9 Mont. 67, 22 Pac. 760; *State v. Mahoney*, 24 Mont. 281, 61 Pac. 647.

6. Appellant complains of certain instructions given by the court, to wit, Nos. 1, 10, 12 and 13. Instruction No. 1 is confined to a statement of the issues of the case. While the jury may be permitted to take with them to the jury-room the pleadings in the case, and if they desire, study the issues for themselves, the practice of setting forth in the instructions a clear and concise statement of the nature of the case and the issues to be determined is to be commended, and the instruction is not objectionable. Instruction No. 10 informed the jury that plaintiff was claiming damages for injury to him in his profession of school teacher, and not as an individual, and in determining whether or not he had been damaged they should consider only such facts and circumstances as tended to show injury to him in the capacity of school teacher, and that they could not consider any facts and circumstances that tended to show injury to him as an individual. There is no suggestion anywhere in the complaint that plaintiff was damaged in his capacity as an individual, but the averments of the complaint are that the injury was to plaintiff in respect to his profession. The action was thus confined, by the terms of the complaint, to such damages as plaintiff might have sustained in his profession, and the court properly excluded from the jury all consideration of damage to plaintiff as an individual.

7. Instruction No. 13 contains nothing of which plaintiff can complain under the evidence as disclosed by the record.

8. A more serious question is presented by instruction No. 12. It reads as follows: "You are instructed that plaintiff's ²¹⁴ cause of action is for alleged damages to his business as a school teacher, caused by the publication of the alleged libelous matter set out in the complaint on the thirteenth day of July, 1901, and that you cannot award him any damages unless such damages he may have received, if he have received any, were caused simply and only by said publication. and

not otherwise; that is to say, if you should find that the plaintiff was damaged in his position and occupation as a school teacher, but that said damage was brought about and caused partly by the publication of other libels or the statement of other false charges or any other person, then you must find for the defendant, notwithstanding you might also find that the damage was partly caused by the publication set out in the complaint." By this instruction the jury were given to understand that, although the plaintiff might have convinced them by satisfactory proof that he sustained damage in his position as school teacher by the publication of July 13, 1901, yet if such injury was caused in part by other libelous publications or false charges, it would be the duty of the jury to find for the defendant. Whether this instruction would be permissible in an action in which the plaintiff was seeking to recover special damages alone, or as confined to that character of damages, is not presented by the record in this case, and is not decided. Plaintiff's first cause of action affords a basis, if the facts warranted it, for the recovery of both general and special damages, but a diligent examination of the record fails to disclose any evidence which would entitle the plaintiff to recover any amount in the way of special damages. The maximum of plaintiff's right to recover, therefore, if at all, was only such general damage sustained on account of the publication declared on. When a false and unprivileged publication possessing the ingredients that stamp it as libelous per se is established, injury is presumed to ensue therefrom as the direct product of such publication, and affords ground for the allowance of at least nominal damages: *Wilson v. Fitch*, 41 Cal. 363; *Mowry v. Raabe*, 89 Cal. 609, 27 Pac. 157; *Childers v. San Jose Mercury*, 105 Cal. 284, 45 Am. St. Rep. 40, 39 Pac. 903; ²¹⁵ *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129; 18 Am. & Eng. Ency. of Law, 2d ed., p. 1081, and cases cited.

Referring to this subject, Mr. Sutherland says: "There is no legal measure of damages for such a wrong. The amount which the injured party ought to recover is referred to the sound discretion of the jury. . . . When the publication is actionable per se, the legal presumption of damage goes to the jury, and they, in view of the particular circumstances of the case, are required, in the exercise of their judgment, to determine what sum will afford reparation": 3 Sutherland on Damages, 643-647.

To recognize the doctrine embodied in instruction 12 as correct law in its application to an action to recover general damage would operate, in effect, to destroy the legal presumption above referred to of presumed injury inherent in per se defamatory charges. It would create a means of defense in actions of this character never contemplated by any principle of law. As pertinently suggested by counsel for appellant, all that a defendant would have to do would be to publish two libels against a party, and then introduce proof to show that he was damaged by both, and plaintiff could recover in neither. It is not an answer to this to say an action could be based upon both. A plaintiff may elect to unite several causes for injuries to character (Code Civ. Proc., sec. 672, subd. 5), but he is not required to do so. Again, the defendant might publish a libelous article, and procure one of similar import to be published by another, and the same result would follow. Such a principle, if it were allowed to control in cases of this character, would seriously jeopardize the interest of a plaintiff whenever he exercised the valuable and unquestionable right to show other defamatory charges for the purpose of proving malice. The case of *Ward v. Dick*, 47 Conn. 300, 36 Am. Rep. 75, and others cited by counsel for respondent in support of the correctness of the instruction under consideration are not in point. They, in effect, decide that other libels or slanders than the one sued ²¹⁶ on, or a repetition of the one sued on, cannot be made an extra element of damage for which compensation may be awarded—a doctrine which will meet with no dissent here. The instruction was an erroneous statement of the law, and the presumption is that it was prejudicial to the plaintiff (*State v. Mason*, 24 Mont. 340, 61 Pac. 861), and the judgment should be reversed, unless there is merit in a contention raised by counsel for respondent, based upon article 3, section 10, constitution of Montana. So much of the section as relates to this case reads as follows: "In all suits and prosecutions for libel, the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts."

Counsel for respondent argues that, the constitution having clothed the jury, in suits and prosecutions for libel, with power to determine the law and the facts, and in this case the jury having found a verdict against the plaintiff, it becomes immaterial how erroneous the instructions of

the court may be; that no error can be remedied by appeal, because the instructions are merely advisory, and may be disregarded by the jury in the exercise of this power to determine the law and the facts. The history of this provision shows it is the outgrowth of an act of the English parliament, adopted in 1792, and known as the "Fox Libel Act." Its enactment, in modified forms, into the constitutions of many of the states of the Union has followed, some of them limiting its operation to criminal prosecutions for libel, while others extend it to civil actions for libel as well; in some is omitted the clause "under the direction of the court," in others it is incorporated, as has been done in the constitution of this state: Cooley's Constitutional Limitations, pp. 460, 463. This provision has received the earnest consideration of the courts of last resort of many of the states, and there exists great contrariety of opinion as to the extent of power conferred upon the jury, independently of the court, to determine the law and the facts and judge of the whole case. A review of the cases relating to this subject can serve no useful purpose here, as the questions whether the jury is required to accept the instructions ²¹⁷ of the court as conclusive, and what power resides in this court to review a case where the instructions and other procedure of the trial court are free from error, are questions not involved in this case. Whatever view is adopted, the courts are almost, if not quite, a unit upon the proposition that it is the duty of the judge to decide upon the sufficiency of the pleadings, the admissibility of testimony, instruct the jury, and discharge the other functions devolving upon him down to the final submission of the cause to the jury, as in other cases. In Missouri, where the doctrine prevails that the jury may disregard the instructions, it is said in *State v. Armstrong*, 106 Mo. 395, 27 Am. St. Rep. 361, 16 S. W. 604, 13 L. R. A. 419, that: "While the judge may assist and inform them what the law is, and it is his duty to do so, still they are, by virtue of organic law, the final judges in a prosecution for criminal libel." In *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747, Justice Dixon, construing a similar constitutional provision, says: "It was not intended to affect the duty of the court to decide all questions of law relating to the admission of testimony and

such other matters as are preliminary to the final submission of the case to the jury; nor to affect its duty to instruct the jury with regard to their legitimate province in the decision of the cause, and with regard to those general principles of the criminal law and of the law of libel which are of a technical nature, and with which the jury scarcely become acquainted, save through the instructions of the court. None of these matters were ever subject to doubt in prosecutions for libel, nor did they bring about any of the legislation either in England or in this country. On these points the instructions of the court retain the same authority as they previously possessed": See, also, *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614; *Hazy v. Woitke*, 23 Colo. 556, 48 Pac. 1048; *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624; *State v. Zimmerman*, 31 Kan. 35, 1 Pac. 257; *State v. Whitmore*, 53 Kan. 343, 42 Am. St. Rep. 288, 36 Pac. 748; *State v. Rice*, 56 Iowa, 431, 9 N. W. 343; *Montgomery v. State*, ²¹⁸ 11 Ohio, 424; *State v. Syphrett*, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 616, and cases cited in note. In *State v. Rice*, 56 Iowa, 431, 9 N. W. 343, and *State v. Syphrett*, 27 S. C. 29, 13 Am. St. Rep. 616, 2 S. E. 624, it was held that an erroneous instruction was ground for reversal.

The duty of the court to instruct the jury being recognized, it follows as a corollary that a correct declaration of the legal principles involved should be given to the jury, otherwise the requirement to instruct would be a needless formality, barren of all useful purpose.

There are other assignments which have been examined, but there is no merit in them. Because of the errors referred to, the judgment and order are reversed, and the cause remanded for a new trial.

Mr. Chief Justice Brantly concurs.

MILBURN, J. I concur in the conclusion and in what is said in the opinion, except as to so much thereof as states or implies that, to say of a school teacher that he has done more damage and less good than any teacher the district ever had "cannot be said to impeach him in any of those qualities which are essentials of an accomplished school teacher, and to falsely assail which it is slanderous or libelous per se."

It is Libelous Per Se to publish of a person that which is false and tends to injure his reputation, thereby exposing him to public hatred, contempt, obloquy, and shame: *Triggs v. Sun Printing etc. Assn.*, 179 N. Y. 144, 103 Am. St. Rep. 841. As to whether imputations of a want of veracity are libelous per se, see *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. Rep. 54; *McGaw v. Hamilton*, 184 Pa. St. 108, 63 Am. St. Rep. 786.

That an Imputation of Want of Professional Ability or integrity is libelous and actionable, see *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317; *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. Rep. 54; *Morasse v. Brochu*, 151 Mass. 567, 21 Am. St. Rep. 474; *Williams v. Davenport*, 42 Minn. 393, 18 Am. St. Rep. 519.

If a Publication is Libelous Per Se, the Law Presumes general damages as natural and probable consequence: *Tracy v. Hacket*, 19 Ind. App. 133, 65 Am. St. Rep. 398. See, too, *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863.

Evidence of Other Libelous imputations are admissible in an action for libel, to show malice and thus enhance the damages: *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863; *Cushing v. Hederman*, 117 Iowa, 637, 94 Am. St. Rep. 320.

On the Jury as Judge of the Law and Facts in actions for libel, see the notes to *State v. Whitmore*, 42 Am. St. Rep. 290-295; *State v. Sypbrett*, 13 Am. St. Rep. 625-627. According to *St. James etc. Academy v. Gaiser*, 125 Mo. 517, 46 Am. St. Rep. 502, a constitutional provision making the jury judges of the law as well as of the facts, does not relieve the court of the duty of passing upon the the pleadings in the case.

Newspaper Libel is discussed at length in the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369.

SHELDON v. POWELL.

[31 Mont. 249, 78 Pac. 491.]

NOTICE—Unrecorded Deed.—The Payment of Taxes by the grantee in an unrecorded deed is not notice of his claim of title to a subsequent purchaser. (p. 433.)

NOTICE—Unrecorded Deed.—The Burden of Proof is on the grantee in an unrecorded deed to show that a subsequent purchaser had notice. (pp. 433, 434.)

NOTICE—Possession—Unrecorded Deed.—If the grantee in an unrecorded deed takes possession of the land, makes improvements thereon by plowing, seeding, and fencing, but does not reside on the premises, and subsequently the grantor takes another person to the property of whom he is attempting to obtain a loan, and no one is found on the premises, and no house save an uninhabitable shack, a bargain and sale deed executed by the grantor to such person as security for a loan, and recorded prior to the deed to the first grantee, has the preference. (p. 434.)

APPEAL.—On an Appeal from the Judgment only, the court may examine the record to determine whether there is any evidence to support the findings. (pp. 434, 435.)

Ransom Cooper, for the appellant.

Greene & Cockrill and P. H. Leslie, for the respondent.

²⁵² POORMAN, C. This is an action to quiet title to certain lands situate in Cascade county, the plaintiff claiming title to them under a deed, and seeking to set aside a subsequent conveyance made to the defendant, which was recorded prior to the plaintiff's deed. The ²⁵³ questions involved were submitted to a jury, which found for the plaintiff. The court adopted the findings of the jury and rendered judgment for the plaintiff. Defendant has appealed from the judgment.

The material facts appearing in the record are that one Gus Streid made final proof on his homestead entry on February 10, 1900; that on that or the succeeding day he conveyed the land to the plaintiff by a deed; that the final receipt issued by the receiver to Streid was never recorded, and the deed executed and delivered by him to the plaintiff was not recorded until March 14, 1901; that the plaintiff, immediately after the execution of the deed to him, took possession of the land, made some improvements by plowing and farming the same during the year 1900, and also seeded a part of the land in the spring of 1901, leaving some of his farming implements on the ground; that plaintiff had fenced the land, inclosing it in large fields with other land owned by him; that the land was assessed to plaintiff in 1900 and 1901; that he paid taxes thereon, but that plaintiff never resided upon the land; that early in March, 1901, Streid made application to one Sires to obtain a loan. Sires, not desiring to loan money at this time, introduced Streid to the defendant, to whom Streid then made application for the loan, offering this land as security. Defendant desiring to see the land, Streid procured a team and went with the defendant, and they together looked over the land, Streid telling the defendant that he had fenced the land, and had plowed about twenty acres of it. There was no one on the land at this time, nor was there any house on it, except a broken-down shack that was uninhabitable. Defendant then returned to Great Falls, went to the office of the county clerk and recorder, and examined the title to the land, and found that the only instrument on record relating thereto was the gov-

ernment patent to Streid, which Streid then had in his possession, dated November 28, 1900, and recorded March 6, 1901. Defendant then loaned Streid three hundred and fifty dollars, and as security therefor, on March 11, 1901, Streid executed and delivered ²⁵⁴ to defendant a bargain and sale deed to the land, which deed was recorded March 11, 1901, three days prior to the recording of plaintiff's deed. The question is, Which of these deeds, under this state of facts, should take the preference?

Section 1641 of the Civil Code provides: "Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." This section unequivocally makes all unrecorded deeds and conveyances, except leases for one year, void as to subsequent purchasers and encumbrancers in good faith and for a valuable consideration. Section 1644, however, provides: "An unrecorded instrument is valid as between the parties and those who have notice thereof." It therefore becomes material to inquire what kind of notice is required by this latter section—whether possession is sufficient notice, and, if so, what kind of possession; whether the payment of taxes is sufficient notice, and on whom is the burden of proof?

Before the enactment of the recording laws, the only means a purchaser had of ascertaining whether his grantor had made a prior conveyance was by inquiry of the party in possession of the land, if occupied, and of those living in the vicinity. Long experience demonstrated that title or claim to title predicated upon information received by inquiry of those who had no right to inquire into the prior ownership of land in which they had no interest, and whose conclusions might therefore be based upon casual observation or rumor, was productive not only of error, but actual fraud. To avoid what thus proved to be an evil, recording laws were enacted. These laws not only serve the double purpose of protecting bona fide purchasers and of affording owners of land an opportunity of preserving their evidence of title, but of affording an opportunity for the

acquisition of information in the preparation of valuable statistics relative to ²⁵⁵ economic conditions, and also of aiding in the preparation of assessment lists. If the same inquiry must be made now as before the laws were enacted, of what use are these laws to the purchaser? We do not understand that such is the contention of counsel, but these laws undoubtedly at least limit the extent of such inquiry.

Chief Justice Campbell, in the dissenting opinion filed by him in *Shotwell v. Harrison*, 22 Mich. 426, says: "The leading case of *Le Neve v. Le Neve*, Amb. 436, was the first in which it was held that a priority of record could be assailed in any court, and the doctrine has ever since been maintained that it may be done, but only by the most convincing proof of fraud, by notice or by want of consideration which raises a constructive fraud. Fraud is the only ground of interference, and it cannot be presumed. The doctrine which assumes this without proof is at war with all the recognized legal presumptions, and I cannot but regard it as dangerous and unreasonable."

In *Page v. Waring*, 76 N. Y. 463, it is said: "Such possession under an unrecorded deed as will amount to notice to a subsequent purchaser must be under the unrecorded deed, and must be actual, open and visible, so that the subsequent grantee could go upon the lands and obtain by inquiry there information of the unrecorded deed." The same doctrine is held in *Brown v. Volkening*, 64 N. Y. 76.

In *Crossen v. Oliver*, 37 Or. 514, 61 Pac. 885, the supreme court of Oregon sustained the following instruction with reference to a similar question: "The notice that will render a party a lienholder in bad faith must be something more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted with respect to the existence of a prior right as to make it fraudulent in him afterward to take and hold the property. In this case notice or knowledge that would bind *Turner Oliver*, and render his judgment subject to the unrecorded deed of *Crossen*, must be either actual knowledge of the existence of this deed, or actual notice of such facts and ²⁵⁶ circumstances as would have enabled him, by following up such information, to have ascertained that *Crossen* held this deed and claimed this land."

In *Godfroy v. Disbrow*, Walk. Ch. (Mich.) 260, it is held "that the presumption of law is that a subsequent purchaser who has got his deed first recorded is a bona fide purchaser without notice, until the contrary is made to appear": See, also, *Atwood v. Bearss*, 47 Mich. 72, 10 N. W. 112.

The payment of taxes on this land by the plaintiff was not of itself, under the law, constructive notice to the defendant that the plaintiff owned or claimed it.

These three questions herein discussed were reviewed by this court in the well-considered case of *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004, in which the court said: "The law is well settled that the actual, visible, notorious, continuous, exclusive and unequivocal possession of 'a definite tract of land by one rightfully in possession or holding under a valid title is a constructive notice to subsequent purchasers and encumbrancers of whatever estate or interest in the land is held by the occupant, equivalent in its extent and effects to the notice given by the recording or registration of his title': 2 Pomeroy's Equity Jurisprudence, sec. 615. Such possession is evidence of some right or title in the occupant, and is sufficient to put a subsequent purchaser or encumbrancer on inquiry as to the rights of the person then in possession." Exceptions are then given to this general rule. The court further says: "The suggestion that the records of the county treasurer's office showing that each of several occupants paid taxes on the parcel of ground in his possession were sufficient to put the appellants upon inquiry has already been considered, but may be further answered by saying that such records are not of themselves constructive notice to purchasers or encumbrancers of the fact that certain persons have paid taxes. We are not advised of any statute which declares the record of the payment of taxes to have that effect." Quoting from the decision in ²⁵⁷ *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782, the court further says: "We are, however, satisfied that the good faith of the purchaser will sufficiently appear by proof of the record of conveyances showing title in his grantor at the time of the purchase, upon which record he had the right to rely, and is presumed to have relied. If he had actual notice of the prior conveyance, this is a fact

affirmative in its nature, and it is therefore more reasonable to require it to be shown by the party claiming under the prior unrecorded deed than to call upon the purchaser to prove the negative." The court also quotes with approval a part of the decision in *Anthony v. Wheeler*, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 281, note, to the effect "that one claiming title to land by a deed to him purporting to be made for a valuable consideration is presumed to be a purchaser in good faith, without notice of prior unrecorded deeds, until the contrary is shown, and that the burden of proof to show notice and want of good faith is on the party attacking the deed."

In the trial of the case at bar the burden was by the trial court cast upon the defendant to show that he was not guilty of fraud in taking this second conveyance. This was error, for, under the decision in *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004, above quoted, the burden was upon the plaintiff to show that the defendant had notice, either actual or constructive, of this prior unrecorded deed.

The evidence in this cause not only fails to show that the defendant was guilty of any fraud whatsoever in accepting this second conveyance, but does show that the defendant had taken all the precaution which the law required of him. Streid was introduced to him by a friend, and made application for a loan. The defendant did not solicit the purchase of the land, but, after the application was made, he went to the land in company with Streid. Streid told him that he had fenced the land, and had plowed a part of it. He found nothing to indicate that Streid's statements were not true. The defendant then went to the records, and found that there had been no conveyance recorded except the patent from the United States to Streid, and Streid had possession of the patent. The mere fact that the fence inclosing ²⁵⁸ the land also inclosed other lands, or that there was more land plowed than Streid estimated that he had plowed, were in no manner contradictory of the recorded title in Streid.

It is contended that, as this is an appeal from the judgment only, resort to the record may not be had to determine the sufficiency of the evidence. This is the rule where there is any substantial conflict in the evidence; but this

court may examine the record to determine whether, as a matter of fact, there is any evidence to support the findings: *Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934; *Mahoney v. Dixon*, 31 Mont. 107, 77 Pac. 519. An examination of the record discloses that there is not any evidence to support the findings of the court, and for this reason we recommend that the judgment be reversed and the cause remanded.

Per CURLAM. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded.

Some Authorities hold that one claiming title to land by a deed purporting to be made for a valuable consideration is presumed to be a purchaser in good faith and without notice of prior unrecorded deeds, and that the burden of proof to show notice and want of good faith is on the person attacking the deed. Other authorities, however, take a different view: See the note to *Anthony v. Wheeler*, 17 Am. St. Rep. 288; *Bell v. Pleasant*, 145 Cal. 410, 104 Am. St. Rep. 61, and cases cited in the cross-reference note thereto. Possession of land under an unrecorded deed, as notice of the occupant's rights, is discussed in the monographic note to *Crooks v. Jenkins*, 104 Am. St. Rep. 345.

WESTERN LOAN AND SAVINGS COMPANY v. SILVER BOW ABSTRACT COMPANY.

[31 Mont. 448, 78 Pac. 774.]

NONSUIT.—On a Motion for a Nonsuit, that which the evidence tends to show must be taken as proved. (p. 436.)

ABTRACTER OF TITLES.—There Must be Some Contract or privity of contract to create liability on the part of an abstracter. (p. 437.)

PRIVIES are Persons Connected together or having mutual interest in the same action or thing by some relation other than that of actual contract between them. (p. 437.)

ABSTRACTER OF TITLES—To Whom Liable.—If an abstract company has an arrangement with a loan association whereby abstracts are furnished at the expense of borrowers of the association for the use of the association, the abstract company is liable to the loan association where it delivers a defective abstract to the association which is relied upon by the association to its injury. (pp. 437, 438.)

John A. Shelton, for the appellant.

W. I. Lippincott, for the respondent.

⁴⁴⁸ POORMAN, C. In this case the district court sustained a motion for nonsuit, and judgment was entered for defendant. The appeal is from this judgment.

⁴⁴⁹ 1. The action was commenced to recover damages alleged to have been sustained by plaintiff by reason of a defective abstract of title to certain real estate which one George A. McDonald mortgaged to plaintiff to secure a loan, the defect being a failure to note in the abstract an unsatisfied judgment then of record against McDonald.

"On motion for nonsuit, . . . that which the evidence tends to show must be taken as proved": *Cummings v. Helena etc. R. R. Co.*, 26 Mont. 434, 68 Pac. 852; *McCabe v. Montana Cent. Ry. Co.*, 30 Mont. 323, 76 Pac. 701, and cases cited.

In this case the evidence tends directly to show that the plaintiff is a building and loan association incorporated under the laws of Utah, and that McDonald was at the time a stockholder therein, and resided at Butte, Montana; that Paul A. Ozanne was president and general manager of defendant company from 1898 to 1900, and, as such official, signed its annual reports, and that he was also the agent of plaintiff company for the purpose of appraising the value of real estate offered as security for loans; that, under an arrangement previously made between plaintiff and defendant, applicants for loans were required to furnish abstracts prepared by defendant, the applicant paying defendant therefor; these abstracts were to be furnished plaintiff, and not the applicant, and the statements therein were relied upon by plaintiff; that the abstract in question was furnished under this arrangement. On May 10, 1899, the written application of McDonald for a loan, offering certain lands for security, was signed and sworn to before Paul A. Ozanne as a notary public, and on the same day the value of this security was appraised by Ozanne and one other, and on May 20th Ozanne sent the application for a loan, together with the appraisement, to the plaintiff, at Salt Lake, Utah. The abstract was made by defendant, and closed with this statement: "We further certify that there are no unsatisfied judgments, liens, attachments or unpaid taxes appearing of record and affecting the property above described, except such as are noted herein. ⁴⁵⁰ Witness our hand and the corporate seal of

said company hereto attached this thirteenth day of May, A. D. 1899, at 2 o'clock P. M. Silver Bow Abstract Co. by Paul A. Ozanne, Manager." This abstract did not contain any reference to a judgment against McDonald. The plaintiff relied exclusively on the abstract being correct, and suffered damage by reason of this omission. The abstract was sent to the plaintiff by Ozanne on May 20th, and the loan was approved May 27th or 28th. The mortgage from McDonald to the plaintiff was acknowledged before Ozanne on June 9th, and about June 13th the check for the loan was sent to Ozanne, and was made payable to McDonald. The plaintiff's license to do business in Montana expired May 31st, and it was not renewed until July 25th, the explanation given being that the state auditor did not furnish the company a form of statement; that, relying upon this being furnished, the company did not make a report until it received this form from the auditor. All the dates herein referred to are in the year 1899.

The motion for nonsuit is based upon two grounds: 1. That there was no privity of contract between plaintiff and defendant; 2. That the plaintiff was not authorized to do business in Montana at the time this mortgage was executed.

The general, perhaps universal, rule of law is that there must be either contract, or privity of contract, to constitute liability on the part of the abstracter: *Symns v. Cutter*, 9 Kan. App. 210, 59 Pac. 671. This rule of law is conceded by the appellant. "Privies" are defined as "persons connected together, or having mutual interest in the same action or thing by some relation other than that of actual contract between them": *Black's Law Dictionary*, 940. "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it": *Civ. Code*, sec. 2103; *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398; *McLaren v. Hutchinson*, 22 Cal. 187, 83 Am. Dec. 59.

The evidence in this case, being admitted for the purpose of this motion to be true, tends not only to establish privity of contract, but an actual contract, between the plaintiff and defendant ⁴⁵¹ with respect to this abstract. The defendant knew that the abstract was made for the exclusive benefit and use of the plaintiff, and knew that

the plaintiff would rely thereon, and the abstract was delivered by the defendant to the plaintiff. Under this state of facts, there can be no doubt as to the liability of the defendant if the action can be maintained: *Brown v. Sims*, 22 Ind. App. 247, 72 Am. St. Rep. 308, 53 N. E. 779.

2. It appears from the record that the plaintiff was licensed to do business in the state of Montana to and including the thirty-first day of May; that this abstract was made on the thirteenth day of May; that it was sent by the defendant to the plaintiff on the twentieth day of May; that the plaintiff acted thereon, and approved the loan not later than the twenty-eighth day of May. It appears, therefore, that the contract or privity of contract existing between the plaintiff and the defendant with respect to this abstract was prior to the time when the plaintiff's license expired, and there is no pretense that plaintiff had not complied with the law at the time the mortgage was foreclosed and at the time this action was commenced.

It is unnecessary to consider the proposition as to whether the penalty named in the law (Sess. Laws 1897, p. 231) is exclusive, or whether the plaintiff can be further punished by having all his contracts declared void or voidable.

We think this judgment should be reversed and the cause remanded.

Per CURLAM. For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

The Liability of Abstracters, including the question of to whom they are liable, is discussed in the monographic note to *Brown v. Sims*, 72 Am. St. Rep. 315-319; *Worden v. Witt*, 95 Am. St. Rep. 87.

The Right to Recover for Negligence where there is no privity is discussed at length in the monographic note to *Woodward v. Miller*, 100 Am. St. Rep. 192-205.

IN RE COLBERT'S ESTATE.

[31 Mont. 461, 78 Pac. 971.]

APPEAL.—A Bill of Exceptions not Made a Part of the statement on a motion for a new trial will not be considered on appeal. (p. 440.)

WILL CONTEST—Mode of Procedure.—Under the Montana statutes, the proponent of a will must first make out a prima facie case, that is, make such proof as would entitle the will to probate in the absence of a contest. Then the contestant attacks the validity of the will, the proponent defends it, and the contestant rebuts the testimony of the proponent. The proponent may sur-rebut any new testimony adduced for the first time in rebuttal; but the contestant has the right to open and close the case. (p. 441.)

LOST WILL—Presumption of Revocation.—If the evidence shows that a lost will was last seen in the possession of the testator when he was mentally competent, it is presumed that he destroyed it *animo revocandi*, and the burden of proof is on the proponent to overcome this presumption. (p. 443.)

LOST WILL—Presumption of Revocation.—The Evidence to Overcome the presumption that a lost will was destroyed by the testator *animo revocandi* must be clear, satisfactory, and convincing. (p. 444.)

LOST WILL—Evidence of Existence.—Evidence that an alleged witness to a lost will stated at the testator's funeral that he had the will in his pocket does not tend to prove that such was the case, there being no evidence that anyone ever saw it in his possession. (p. 445.)

LOST WILL.—The Proponent of a Lost Will Must Prove either that the will was actually in existence at the time of the testator's death, or that it is in existence in contemplation of law. (p. 445.)

LOST WILL.—The Declarations of a Testator to the effect that he was well satisfied with his will are not admissible, in conjunction with the testimony of witnesses who had seen it, to overcome the presumption of revocation which follows from the fact that the will was last seen in his possession when he was mentally sound. (pp. 446, 447.)

NEW TRIAL—Newly Discovered Evidence—Proof of Diligence. An applicant for a new trial on the ground of newly discovered evidence must make strict proof of diligence. A general averment of its existence is insufficient; but he must set forth in his affidavits in detail and with particularity what acts were performed. The affidavits should show what diligence was used, how the new evidence was discovered, why it was not discovered before the trial, and such other facts as make it clear that the failure to produce the evidence was not because of the fault or want of diligence of the movant. (p. 454.)

NEW TRIAL—Newly Discovered Evidence—Proof of Diligence. A statement in affidavit for a new trial on the ground of newly discovered evidence that the movant made inquiry of every person he

thought might know anything about the case, is an insufficient showing of reasonable diligence. (p. 456.)

NEW TRIAL—Newly Discovered Evidence.—It is the Duty of the Court, on hearing a motion for a new trial on the ground of newly discovered evidence, to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility of the witnesses. (pp. 456, 457.)

NEW TRIAL—Newly Discovered Evidence.—A new trial should not be granted on the ground of newly discovered evidence, unless such evidence makes it clearly probable that it will produce a different result on the retrial. (p. 457.)

NEW TRIAL—Newly Discovered Evidence—Discretion of Court.—Applications for new trials on the ground of newly discovered evidence are addressed to the sound legal discretion of the trial judge, and his action thereon will not be disturbed on appeal, except for a clear and unmistakable abuse of such discretion. (pp. 457, 458.)

John J. McHatton and O. J. Saville, for the appellant.

James Donovan and C. F. Kelley, for the respondents.

⁴⁶⁵ **CALLAWAY, C.** Appeal by one Frederick W. Scheuer from a judgment denying the probate of an alleged lost will, and from an order overruling his motion for a new trial.

In the beginning we are met with the objection on the part of respondents that there is no record before this court upon which it may determine the matters presented by this appeal. This objection is based upon certain alleged fatal irregularities occurring in the preparation and settlement of the statement on motion for a new trial, which are made to appear by a bill of exceptions. This bill of exceptions is not made a part of the statement on motion for a new trial, and under the rule laid down in *Beach v. Spokane Ranch etc. Co.*, 25 Mont. 367, 65 Pac. 106, we cannot consider it. And see *State v. District Court*, 29 Mont. 265, 74 Pac. 498; *Sweeney v. Great Falls etc. Ry. Co.*, 11 Mont. 34, 27 Pac. 347; *Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124. We shall therefore pass on to the merits of the controversy.

Charles Colbert died on February 14, 1901, in a cabin in Butte. Among his neighbors he was known as a wealthy, but miserly, old bachelor, and it may be said incidentally that several ⁴⁶⁶ of these expected at his death to find themselves his beneficiaries. Shortly after his demise the clerk of the court received through the mails, or from an unknown source, an instrument purporting to be the last will and testament of Charles Colbert. The beneficiaries therein named were

William I. Lippincott and John Woolbeater. In due time thereafter Woolbeater filed his petition asking that the will be admitted to probate. Thereupon the state of Montana, through the attorney general, filed a protest against the probate of this alleged will, on the ground that it was a forgery. The state alleged that Colbert died intestate, leaving no relatives, and that his estate should, under the law, escheat to it. Shortly after this a petition was filed by appellant, Frederick Scheuer, alleging that Colbert made a will in 1896, in which he had named Scheuer and one Lillian E. Burton, now Lillian E. Fluke, his beneficiaries. It was further alleged that this will was in existence at the time of Colbert's death, but had been destroyed or lost, and therefore could not be produced; that it was witnessed by two persons—John Woolbeater and one John Doe, whose true name and residence were unknown. Thereafter appellant filed an amended petition, asking that the lost will be admitted to probate, and in this petition stated that the subscribing witnesses to the will were John Woolbeater and one John Ackerman, both residents of Butte. Appellant and Lillian E. Fluke also filed objections to the will proposed by Woolbeater. The state of Montana likewise filed its objections against the so-called Scheuer or lost will, alleging that no such will had ever been made by decedent. Woolbeater did not file any objections to the so-called Scheuer will. Many pleadings were interposed by the contending parties, but the foregoing seems to be sufficient to illustrate their contentions.

In order to simplify the discussion, it will be well to ascertain first what are the essentials in proving a lost will. In every will case under our statute the rule of procedure is that the proponent of the will must first make out a *prima facie* case; that is to say, must make such proof as would entitle the will to ⁴⁸⁷ probate in the absence of a contest. Then the contestant attacks the validity of the will, the proponent defends the same, and the contestant rebuts the testimony of the proponent. Doubtless the proponent may sur-rebut any new testimony adduced for the first time in rebuttal (*Maloney v. King*, 30 Mont. 158, 76 Pac. 4), but the contestant has the right to open and close the case: Code Civ. Proc., secs. 2340-2346; *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319. This disposes of one of appellant's principal assignments of error.

The following sections of the Code of Civil Procedure are directly pertinent:

“Sec. 2370. Whenever any will is lost or destroyed the district court must take proof of the execution and validity thereof, and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills as in other cases. All the testimony given must be reduced to writing and signed by the witnesses.

“Sec. 2371. No will shall be proved as a lost or destroyed will unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

“Sec. 2372. When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge, under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified and filed as in other cases, and shall have the same effect as evidence as provided in section 2344.”

At the trial the state and appellant jointly fought the Woolbeater will, and in turn the state and Woolbeater fought the Scheuer will. After the evidence had been closed as to the ⁴⁶⁸ Woolbeater will, the appellant undertook to make out a prima facie case. It was incumbent upon him first to show affirmatively either that the will he proposed was in existence at the time of the death of Colbert, or that it was fraudulently destroyed during Colbert's lifetime. This he failed to do. He did prove prima facie some pertinent facts; for instance, he adduced evidence tending to prove that Colbert executed a will in the spring of 1896, wherein he and Lillian E. Burton were named as beneficiaries; that its contents were made known to at least three persons; that the will was seen about Christmas time in 1896, in August, 1899, about three weeks before Colbert's death, and on the day before his death. The witness who said he saw the will the day before Colbert died testified that he went to see Colbert upon important business, and conversed with him about it. Without proceeding further in detail, it is sufficient to say that the testimony of

this witness, if true, shows beyond any question that at the time when the will was last seen it was in Colbert's possession, and Colbert was then in the exercise of his mental faculties. So far as the record discloses, it was never seen again. The better opinion is that under circumstances like the foregoing the presumption is that the testator, having possession of the will, and being mentally competent, himself destroyed the will *animo revocandi*. This being the case, the burden of proof was on the proponent appellant to overcome this presumption: See note to *Clark v. Turner*, 38 L. R. A. 434, and cases cited. And the proof required to overcome it must be clear, satisfactory and convincing.

An instructive case upon this subject is that of *In re Kennedy's Will*, 30 Misc. Rep. 1, 62 N. Y. Supp. 1011, in which the court said: "The law of this state is well settled that where no testamentary papers have been found after a careful and exhaustive search, the presumption is that the decedent herself destroyed the will with the intention of revoking it: *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110; *Knapp v. Knapp*, 10 N. Y. 276; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *Hard v. Ashley*, 88 Hun, 103, 469 34 N. Y. Supp. 583; *In re Nichols*, 40 Hun, 387; *Betts v. Jackson*, 6 Wend. 173. And even in England, where the courts are not controlled, as here, by any positive statutory provisions, the presumption is the same, as shown by the following cases: *Colvin v. Fraser*, 2 Hagg. Ecc. 266; 3 Phill. Ecc. 126, 462, 552; 1 Swab. & T. 32; 32 L. J. Prob. 202; 36 L. J. Prob. 7; 7 El. & Bl. 886. The only cases where this presumption does not exist will be found to be where the will is clearly shown not to have been in the possession of the testator at the time of his death: *In re Brechtee's Estate*, N. Y. Surr. Dec. 1893, p. 709; *Hamersley v. Lockman*, 2 Dem. Sur. 524; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *In re Marsh*, 45 Hun, 107. 'Legal presumptions are founded upon the experience and observation of distinguished jurists as to what is usually found to be the fact resulting from any given circumstances; and the result being thus ascertained, whenever such circumstances occur, they are *prima facie* evidence of the fact presumed': *Betts v. Jackson*, 6 Wend. 173. In the last-named case the court says that it is a fact that for every will that is publicly destroyed five wills are secretly destroyed by the testator. The law will not speculate as to the motives which may have operated upon the testator's

mind, either in the direction of intestacy or otherwise. The presumption that the decedent destroyed the will *animo revocandi* is so strong as to stand in the place of positive proof. The principle that a state of things once shown to exist will be presumed to continue, and that, therefore, the court should presume that, as in the case of a lost deed, the will remained in existence down to the death of the testator, does not apply to the case of a will: *Betts v. Jackson*, 6 Wend. 173. Bearing in mind, then, this presumption of law, the will must be absolutely held by me to have been destroyed by the testatrix during her lifetime, unless positive and satisfactory proof to the contrary can be produced sufficient to rebut and overcome that presumption."

This case was affirmed by the supreme court of New York by a decision which is found in 53 App. Div. 105, 65 N. Y. 470 Supp. 879, and was again affirmed by the court of appeals in a decision found in 167 N. Y. 163, 60 N. E. 443, in which the court says: "The burden of proof was upon the proponents, and the execution of the instruments having been shown, it was claimed that the court should presume that they were in existence at the time of the death of the testatrix, unless the contrary was established. It is urged that in such cases the law presumes that a fact continuous in its character continues to exist until the contrary is proved, and that there is a presumption that an instrument shown to have been executed continues in existence. This rule, however, has no application to an ambulatory instrument like a will or codicil. Indeed, as to such an instrument the presumption is the other way. It appears that a careful search was made among the papers and effects of the deceased, and neither the will nor the codicil could be found. No testamentary papers having been found after a careful and exhaustive search, the presumption arises that the decedent herself destroyed the will and codicil *animo revocandi*: *Betts v. Jackson*, 6 Wend. 173; *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *Knapp v. Knapp*, 10 N. Y. 276; *Hard v. Ashley*, 88 Hun, 103, 34 N. Y. Supp. 583; *Matter of Nichols*, 40 Hun, 387."

There was no proof adduced that the will was fraudulently destroyed in the testator's lifetime. Appellant attempted to show that it was fraudulently destroyed after Colbert's death by Woolbeater and others, presumably for the purpose of

showing that the will was in existence at the time of Colbert's death. Of course, such testimony would have been competent, but appellant failed to show anything of the kind. He alleged that Woolbeater was a witness to the lost will. Woolbeater denied this, and said he never saw Colbert sign a will at any time. Appellant produced witnesses who swore that Woolbeater, while attending the funeral, said he had the Scheuer or lost will in his pocket at the time. This Woolbeater denied in toto. Appellant apparently places much reliance upon the evidence of ⁴⁷¹ those who testify to these statements, but obviously this testimony could have but one effect—to impeach Woolbeater, or establish the fact that he had at different times made contradictory statements. It did not tend to prove even remotely that Woolbeater ever had possession of the so-called Scheuer will. It simply proved him unworthy of credit, and tended to show his statements, upon which appellant relied as establishing the existence of the will, to be unworthy of belief. No one ever saw the will in Woolbeater's possession, so far as the testimony discloses.

Now, as we have heretofore seen, the statute is to the effect that the proponent of a lost will must prove either that the will was actually in existence at the time of the testator's death, or that it is in existence in contemplation of law. If it was fraudulently destroyed in his lifetime, it is still so in existence. If appellant cannot prove that the will was in existence, either actually or in contemplation of the law, at the time Colbert died, it follows that his case cannot stand. In order to overcome the presumption of revocation which follows from the fact that the will was last seen in Colbert's possession when he was in possession of his mental faculties, appellant introduced certain declarations of Colbert's in conjunction with the testimony of witnesses who had seen the will, to the effect that Colbert said he was well satisfied with it. As this question is one of first impression in this court, we deem it necessary to examine it at some length. A respectable line of authorities holds that such declarations are competent as tending to show that the will being in existence, and the testator being satisfied with it, it is not likely that he destroyed it; in other words, that he would be likely to follow out the inclinations which he had always expressed with respect to it. Nothing can be founded upon a more insecure basis. The will is, according to law, of an ambulatory character. No one except the testator has any rights in it what-

soever. No other person can have any rights in it until the testator is dead. He may change it at pleasure, and human experience has shown that wills are almost always destroyed secretly.

⁴⁷² It seems to us that the better line of authorities is to the effect that such declarations are not admissible at all unless they are a part of the *res gestae*, and are introduced simply to show the mental condition of the testator when he did the thing which is being inquired into; that is, either when he executed the will or when he destroyed it. If any other rule is followed, it may result in this: A testator makes a will in the presence of witnesses. It is executed with all the formalities of law. These witnesses remember its contents. Other witnesses see it. The testator has expressed himself at various times as being satisfied with it. Then he secretly destroys it. In order that such will be admitted to probate after the death of the testator, it would only be necessary to have these different witnesses testify to the facts touching its execution, etc., and thus the intention of the testator as to the disposal of his property would be thwarted. It would impose upon a testator the necessity of revoking his will with as much publicity as that with which he created it, and the clause of the statute which provides that a testator may revoke his will by destroying it might be made nugatory in a given instance.

In the case of *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. Rep. 474, 45 L. ed. 663, the court, speaking through Mr. Justice Peckham, says: "After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestae*, are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to ⁴⁷³ mental capacity as those upon any other subject. But if the matter in issue be not

the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

“When they are not a part of the *res gestae*, declarations of this nature are excluded, because they are unsworn, being hearsay only, and where they are claimed to be admissible on the ground that they are said to indicate the condition of mind of deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, when the mental or testamentary capacity of the deceased is not in issue. . . . The law cannot, therefore, be regarded as settled in England that, even in the case of a lost will, declarations of the testator made after its execution are to be admitted as evidence of its contents. It is also proper to call attention to the fact that all the judges participating in the decision of Sugden's case were entirely satisfied with the proof of the contents of the lost will, wholly aside from evidence of these declarations. While the case is not like the one before us, inasmuch as the inquiry here is not in regard to the contents of a lost will, yet it might, perhaps, be urged with some force that, if declarations of that kind were admissible, the evidence now before us is competent, and was properly admitted. We are, however, convinced that the true rule excludes evidence of the kind we are considering. We remain of the opinion that the declarations come within no exception to the law excluding hearsay evidence upon the trial of an action, and we think the exceptions should not be enlarged to admit the evidence. Where the issue is not one in regard to the mental capacity of the alleged testator to make a will, his declarations upon the subject cannot be said to be declarations made against interest, such as declarations made by an individual while in possession of property, in disparagement of his ⁴⁷⁴ absolute ownership. Such evidence has been admitted as declarations against interest, or as characterizing possession, but the same declarations, made after a conveyance of the land, would be inadmissible as mere hearsay, and in no degree as declarations against interest. Declarations made by an alleged testator before or after the date of the paper are not declarations against

interest, because they can have no effect upon his interest. The will would not take effect until after his death, and before that time he could revoke it or make another, and it would still be immaterial evidence, even if he did neither.

“No inference is generally more uncertain or unreliable than that which is sought to be drawn upon the question of the genuineness of a will from the alleged condition of a testator’s mind toward relatives or others, as evidenced by his declarations. It is everyday experience that declarations of that nature are to the last degree unreliable as a basis for an inference as to probable testamentary disposition of property. Those who thought by reason of such declarations that they would certainly be remembered in the will of the testator are so frequently disappointed that it would seem exceedingly unsafe to permit a jury to draw an inference based upon such evidence, relative to the genuine character of the instrument propounded as a will.”

Justice O’Brien, delivering the opinion, commenting on this case in *Re Kennedy’s Will*, 30 Misc. Rep. 1, 62 N. Y. Supp. 1011, said: “As I read that case, it is a decision of the highest court in the land that the declarations of the deceased, when not a part of the *res gestae*, are not admissible to prove the execution of a will or its revocation, or rebutting the presumption of revocation from the fact that no will is found after death.”

And in the case of *In re Calkins*, 112 Cal. 296, 44 Pac. 577, the court said: “The respondent does not claim that there is any direct evidence in support of the verdict outside of the evidence of certain declarations of the testatrix. The evidence chiefly relied upon by him consists of certain declarations made by her, which were admitted in evidence over the objection of ⁴⁷⁵ the proponent. To the extent that these declarations at or prior to the making of the will afforded any evidence bearing upon the state of the testatrix’s mind at the time of the execution of the will—her mental capacity, the condition of her mind toward the object of her bounty, as well as toward the persons by whom she was surrounded, and the correspondence of her acts with the feelings and purposes entertained by her at the time she executed the will—they were properly admitted, and were entitled to consideration by the jury; but to the extent that they purported to be declarations of the acts of others, or of her own acts, they

were but matters of hearsay merely, whose truth rested in the veracity of the utterer, and upon which there was no opportunity of cross-examination or of explanation by the party who had uttered them, and were not entitled to any weight by the jury, and cannot be considered for the purpose of sustaining their verdict: *Shailer v. Bumstead*, 99 Mass. 112; *Potter v. Baldwin*, 133 Mass. 427; *Bush v. Bush*, 87 Mo. 480; *Jones v. Roberts*, 37 Mo. App. 163; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Marx v. McGlynn*, 88 N. Y. 357; *Matter of Palmateer*, 78 Hun, 43, 28 N. Y. Supp. 1062; *Griffith v. Diffenderffer*, 50 Md. 466''; *Wells v. Wells*, 144 Mo. 198, 45 S. W. 1095.

It thus appears that appellant's case, upon this phase of it, was wholly insufficient to overcome the presumption of revocation.

One of the grounds stated by appellant in the notice of intention to move for a new trial was that of newly discovered evidence, which could not with reasonable diligence have been discovered and produced at the trial. In support of this ground he filed the affidavit of one John Kempfer, who stated, in substance, that he was a resident of Butte, and was acquainted with Charles Colbert for several years prior to his death; that Colbert had shown him a will, signed by Colbert as testator and by John Woolbeater and William Ackerman as witnesses, in which Frederick Scheuer and Lillian E. Burton were the beneficiaries; that affiant was familiar with its contents, substantially; that ⁴⁷⁶ prior to the time of the death of Colbert affiant went from Butte to East Helena, where he remained until about the 8th of March, 1901, which was subsequent to the death of Colbert; that upon his return to Butte he occupied a house on the Emory placer claim, the property of Colbert, near a cabin occupied at that time by Woolbeater; that shortly after his return from East Helena, and after the date of his occupation of the house on the Emory placer, Woolbeater called upon him, and in a conversation concerning the death of Colbert he asked Woolbeater what had become of the will made by Colbert during the year 1896, in which Frederick Scheuer and Lillie Burton were named as beneficiaries, and that thereupon Woolbeater withdrew the will from his pocket and showed it to affiant, who thereupon read it over, and saw that it was the same paper which had been shown to him by Colbert; that it was in the same condition as when last shown to him by Colbert, and bore the

genuine signature of Charles Colbert as testator and the names of John Woolbeater and William Ackerman as witnesses; that the said paper was dated in the year 1896, written with a pen and ink upon ordinary legal cap paper, and was the same paper that had been previously shown to him. He further deposed that he had never mentioned the matters contained in his affidavit to anyone until after the trial of this action, and said that the paper was in existence at least three weeks or a month subsequent to the death of Colbert, being in the possession of Woolbeater, intact, at that time.

In support of this affidavit appellant filed an affidavit in which he deposed that he had discovered the evidence stated in the affidavit of Kempfer since the trial; that he was unable to discover it prior to the trial, "although he had inquired of different persons living in the vicinity, and of every person who he thought had any knowledge of the facts or circumstances concerning the death of Colbert, as to whether the said will offered by him for probate was in existence at and subsequent to the date of Colbert's death, but that he was unable to discover any other evidence than that which was offered upon the trial."

⁴⁷⁷ The affidavit shows that appellant has been diligent in procuring evidence—in fact, has done all in his power to procure it; that the new evidence offered was upon a material matter; that it was not cumulative, and not of an impeaching nature. Indeed, it was the very essential evidence which the appellant lacked at the trial, and by reason of the absence of which he was unable to proceed with his proof. In appellant's affidavit he also averred that he could produce the said Kempfer as a witness upon the trial, and that Kempfer would testify to the facts alleged in his affidavit. We cannot say that the new evidence will not probably change the result if a new trial is granted. The witness Lillian Fluke, née Lillian Burton, made an affidavit to the same effect as that of appellant. The state made no attempt to contradict these affidavits in any way. They stand admitted in the record, and import verity. With this uncontradicted showing upon a matter of the utmost materiality, we think the court abused its discretion in not granting the motion for a new trial.

Many other errors are assigned by appellant, but in view of what has been said in the foregoing, we do not think it necessary to discuss them.

For the reasons given, we think the judgment and order should be reversed, and the cause remanded for a new trial.

Per CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause is remanded.

A rehearing was granted January 23, 1905, and the following additional opinion was rendered thereon:

⁴⁷⁸ CLAYBERG, C. Upon the original hearing of this case the court decided that the affidavits of newly discovered evidence were of such character ⁴⁷⁹ as to warrant the granting to appellant of a new trial in the court below. The court, upon motion, granted a rehearing upon this point alone. Upon the rehearing, counsel for the state take the position that these affidavits are insufficient to entitle appellant to a new trial. It is but fair to the court, and to the commissioner who prepared the former opinion, to say that the attorneys for the state on the former argument treated the question of the sufficiency of these affidavits very briefly. Had they then made as full a presentation of this question as they do now, the result would have been different. The record on appeal is very voluminous, and we were not aided in its examination upon this point by such references thereto as are now presented. For this reason the record was misapprehended in some respects, and some of the language of the opinion was not sufficiently guarded.

The affidavit of John Kempfer is as follows: "John Kempfer, being first duly sworn, on oath deposes and says that he is a resident of Butte City, Silver Bow county, Montana, and that he was acquainted with Charles Colbert for several years prior to his death; that on several occasions prior to the death of said decedent, said decedent had spoken to him about a certain will which he, the said decedent, had executed during the year 1896, in which said will Frederick W. Scheuer and Lillian E. Burton, now Lillian E. Fluke, were the sole beneficiaries, and that the said will was signed by the said Charles Colbert and by John Woolbeater and William Ackerman as witnesses; that the said decedent, Colbert, had conversed with this affiant on several occasions concerning the said will during his lifetime, and had shown the same to him; and that this affiant was familiar with its contents, substantially, by reason of the fact of the said Colbert's

having shown the same to him, and having seen the same, together with the names of the persons attached thereto as witnesses, in addition to the name of the said Charles Colbert. Affiant further says that some time prior to the death of the said Charles Colbert, he left the city of Butte, Montana, and removed to East Helena, in Lewis and Clarke county, in said ⁴⁸⁰ state, and remained there until about the eighth day of March, A. D. 1901, which was subsequent to the date of said Charles Colbert's death; that upon his return he occupied a house on a portion of the Emory placer claim, the property of the said Charles Colbert, near a certain house or cabin occupied at that time by John Woolbeater, the proponent of the so-called Woolbeater-Lippincott will in this cause; that a short time after his return from East Helena, and after the date of his occupation of said house on the said Emory placer claim, the said John Woolbeater called on him, and in a conversation concerning the death of Charles Colbert, which had previously occurred, this affiant asked the said Woolbeater, in substance, what had become of the will made by Colbert during the year 1896, in which the said Frederick W. Scheuer, or Freddie Scheuer, and Lillian E. Burton, or Lillie Burton, were named as beneficiaries, and that thereupon the said Woolbeater withdrew the said will from his pocket and showed it to this affiant, who thereupon looked at it, read it over, and saw that it was the same paper which had been shown to him by the said Colbert during his lifetime, and was in the same condition as when last shown to him by the said Charles Colbert previous to his death, said paper bearing the genuine signature of Charles Colbert as testator, and the names of John Woolbeater and William Ackerman as witnesses. Affiant further says that the said paper was dated in the year 1896, and was signed as hereinbefore stated, and was written with a pen and ink upon ordinary legal-cap paper, and was the same paper that had been previously shown to him. Affiant further says that he never mentioned said matters to anyone until after the trial of the above action. Affiant further says that the said paper was in existence, as hereinabove stated, at least three weeks or a month subsequent to the date of Charles Colbert's death, and was in the possession of said John Woolbeater, intact, at that time."

The affidavit of Frederick W. Scheuer is as follows: "Frederick W. Scheuer, being first duly sworn, deposes and says that he is one of the contestants of the so-called Woolbeater-

Lippincott ⁴⁸¹ will, offered for probate in the above-entitled action, and that he is the proponent of the so-called Scheuer-Fluke will, which was offered for probate as a lost will in the said cause; that since the date of the said trial, and the dismissal of his petition to have the said lost will probated, he has discovered evidence as to the existence of said will subsequent to the death of said Charles Colbert, deceased, which said evidence he was unable to discover prior to the time of said trial, and the dismissal of his petition and contest, although he had inquired of different persons living in the vicinity, and every person whom he thought had any knowledge of the facts or circumstances surrounding the death of said Charles Colbert, and as to whether or not the said will offered by him for probate was in existence at and subsequent to the date of his said death; that he was unable to discover any other evidence than that which was offered upon the trial. Affiant further says that since the date of said trial he has discovered that John Kempfer, an acquaintance of said Charles Colbert, deceased, and also of said John Woolbeater, saw the will offered by this affiant for probate in the possession of said John Woolbeater about three weeks or a month subsequent to the date of said Colbert's death; that the said Woolbeater showed the said will to the said Kempfer, and that the said Kempfer recognized the same as being the will which had been shown to him by Charles Colbert during his lifetime; and that the said Kempfer had read the said will previous to the death of said Charles Colbert, and had seen the signatures attached thereto, and was familiar with the contents thereof, as this affiant is informed and believes. Affiant further says that the said Kempfer never told him, or anyone representing him, prior to the date of said trial, or prior to the date of the dismissal of affiant's petition to have the said lost will probated, that he had any knowledge concerning the execution, existence or possession of said will by Woolbeater subsequent to Colbert's death, and that therefore he could not produce the said witness upon the trial of said cause, or produce his evidence. Affiant further says that he herewith presents, as part of his ⁴⁸² motion for a new trial, the affidavit of the said John Kempfer, showing the facts that he is familiar with concerning the execution of said will by the said Charles Colbert during his lifetime, and showing the conversation had by Kempfer with Colbert concerning the same, and showing the existence of the said will sub-

sequent to Colbert's death, the same being in the possession of John Woolbeater subsequent to said time. Affiant further says that if a new trial is granted in this cause, he can produce the said John Kempfer as a witness upon the trial hereof, and produce evidence showing the facts stated in the affidavit of said John Kempfer, herewith filed, and referred to in support of affiant's motion for a new trial, and that he can also show by the said witness that the said will was in existence subsequent to the date of the death of Charles Colbert. Wherefore affiant asks that a new trial be granted in this cause."

The affidavit of Mrs. Fluke was identical with the affidavit of Scheuer, above quoted, and need not herein be set forth.

Before considering the affidavit of Kempfer, it is necessary to ascertain whether, by the affidavits of appellants, reasonable diligence is shown on their part to discover before the former trial the testimony which they say Kempfer will now give. A careful consideration of the contents of these affidavits, and the adjudications of our own and various courts of last resort, leads us irresistibly to the conclusion that they do not disclose the exercise of such diligence as is contemplated by section 1171 of the Code of Civil Procedure. We lately had occasion to investigate the question of reasonable diligence in a case of similar character, and after citing numerous authorities, we announced the following rule: "Under these authorities, it was incumbent upon plaintiffs to show that they had been guilty of no laches, and that failure to produce the evidence on the trial could not be imputable to lack of diligence on their part. They must make strict proof of diligence, and a general averment of its existence is insufficient. Whether reasonable diligence has been used is a question to be determined by the court upon the affidavits presented, and therefore these affidavits should state with particularity ⁴⁸³ what acts were performed. They should show what diligence was used, how the new evidence was discovered, why it was not discovered before the trial, and such other facts as make it clear that the failure to produce the evidence was not their own fault, or because of want of diligence on their part": *Nicholson v. Metcalf*, 31 Mont. 276, 78 Pac. 483.

The movant for a new trial on the ground of newly discovered evidence must set forth such facts as will enable the court to determine whether reasonable diligence was exercised.

Every presumption that he could have secured the testimony for the former trial will be indulged against him. He must therefore negative any negligence. The question being one for the court, as to whether reasonable diligence was exercised, and this question having to be determined upon the affidavits filed, great care should be exercised in their preparation. They should set forth such facts as will enable the court to determine whether reasonable diligence was exercised. They should state in detail and with particularity what was done by the parties with reference to obtaining the new evidence, how and when it was discovered, etc., and thus give the adverse party the opportunity to traverse the statements if desirable. The reason of this rule is well stated in *Baker v. Joseph*, 16 Cal. 173: "The temptations are so strong to make a favorable showing, after a defeat in an angry and bitter controversy involving considerable interests, and the circumstance that testimony has just been discovered, when it is too late to introduce it, so suspicious, that courts require the very strictest showing to be made of diligence and all other facts necessary to give effect to the claim."

. The affidavit of Scheuer discloses that since the former trial "he has discovered evidence as to the existence of said will subsequent to the death of said Charles Colbert, deceased, which said evidence he was unable to discover prior to the time of said trial, . . . although he had inquired of different persons living in the vicinity, and every person whom he thought had any knowledge of the facts or circumstances surrounding the death of said Charles Colbert, and as to whether or not the said ⁴⁸⁴ will offered by him for probate was in existence at and subsequent to the date of his said death; that he was unable to discover any other evidence than that which was offered upon the trial." This affidavit further discloses "that the said Kempfer never told him, or anyone representing him, prior to the date of said trial, or prior to the date of the dismissal of affiant's petition to have the said lost will probated, that he had any knowledge concerning the execution, existence or possession of said will by Woolbeater subsequent to Colbert's death, and that therefore he could not produce the said witness upon the trial of said cause, or produce his evidence." As above stated, the affidavit of Mrs. Fluke is identical with that of Scheuer. This is the only showing of exercise of reasonable diligence that is found in the affidavits.

It is well settled that a statement in an affidavit that the party has made inquiry of every person he thought might know anything about the case is insufficient: *Smith v. Williams*, 11 Kan. 104; *Patterson v. Collier*, 77 Ga. 292, 3 S. E. 119; *Toney v. Toney*, 73 Ind. 34; *Flersheim M. Co. v. Gillespie*, 14 Okla. 143, 77 Pac. 183; *Keisling v. Readle*, 1 Ind. App. 240, 27 N. E. 583; *Richter v. Meyers*, 5 Ind. App. 33, 31 N. E. 582; *Hines v. Driver*, 100 Ind. 315. The opinion in the last case cited is very exhaustive and very able, and we refer to it for a full discussion of the point under consideration.

It will be noticed that there is no showing that Kempfer did not live in the immediate vicinity of the residence of Colbert for a time commencing a few weeks after his death up to the trial of the case. He states in his affidavit that he returned to Butte about the eighth day of March, 1901, and resided on the property formerly owned by Mr. Colbert. Appellants show no excuse for not inquiring of him what he knew in regard to the matter, if anything, or that they were not aware of his residence in the vicinity. To use the language of the supreme court of Indiana: "For all we know, from his affidavit, the two persons whose affidavits he produces may have been his nearest neighbors and his intimate friends, with whom he had frequently had ⁴⁸⁵ consultations about the case": *Graham v. Payne*, 122 Ind. 403, 24 N. E. 216. It is not shown how soon after the trial, or by what means, this evidence was discovered. It may have been discovered by the diligence of appellants or their attorneys, spurred on by defeat, soon after the trial. If this is true, they might possibly have discovered it before the trial, by the exercise of the same diligence: *Kansas City etc. R. Co. v. Phillips*, 98 Ala. 159, 13 South. 65.

The facts set forth in the affidavit of Kempfer are contradicted in some respects by the testimony given at the trial. When the motion for a new trial was presented to the court below, there was before that court for consideration all the evidence given on the trial of the case, and in this evidence we find the contradictions above referred to. Therefore the language used in the former opinion that these affidavits are uncontradicted and import verity is not sustained by the record.

It was the duty of the trial court, on the hearing of the motion for a new trial, "to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility

of the witnesses": State v. Stain, 82 Me. 472, 20 Atl. 72; Leyson v. Davis, 17 Mont. 220, 293, 42 Pac. 775, 31 L. R. A. 429. But, again, a motion for a new trial should not be granted on newly discovered evidence unless such evidence makes it clearly probable that it will produce a different result on the retrial: State v. Hardee, 28 Mont. 18, 72 Pac. 39. While this rule was doubtless in the mind of the writer of the opinion upon the former hearing of this case, it is not stated with exactness, but in language which might mislead.

In Commonwealth v. Flanagan, 7 Watts & S. 415, the supreme court of Pennsylvania say: "After verdict, when the motion for a new trial is considered, the court must judge, not only of the competency, but of the effect of evidence. If, with the newly discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted; otherwise they are bound to refuse the application. And in ⁴⁸⁶ Ludlow's Heirs v. Park, 4 Ohio, 5, it is ruled that in considering the motion the court will not inquire whether, taking the newly discovered testimony in connection with that exhibited on the trial, a jury might be induced to give a different verdict; but whether the legitimate effect of such evidence would require a different verdict. The question, therefore, is (supposing all the testimony, new and old, before another jury) not whether they might, but whether they ought to, give another verdict." This language is quoted with approval by the supreme court of Maine in State v. Stain, 82 Me. 72, 20 Atl. 72, and a long list of authorities is cited supporting the doctrine. While the rule thus stated is more stringent than the one we have adopted, the quotation has been given to show the position of other courts.

The court below heard the testimony given on the trial from the mouths of the witnesses, observed their conduct and demeanor on the witness-stand, and had better means of weighing the testimony than this court possesses. It is to be presumed, in the absence of any showing to the contrary, that the court below considered all these conditions in passing upon the motion for a new trial.

One singular circumstance referred to in the affidavit of Kempfer deserves attention in this connection. He states that one Woolbeater showed him the Colbert will, made in favor of appellants, after March 8, 1901, and subsequent to Colbert's death. The record discloses that prior to this time,

and on February 21, 1901, Woolbeater had filed a will for probate purporting to have been executed by Colbert in his own and Lippincott's favor, and the petition for such probate had not been heard. This statement strikes us as being so unreasonable that it is not worthy of belief, and we are inclined to think that, in all probability, a jury, in passing upon its truth, would be impressed in the same manner. We cannot say, from an examination of the record, that a different result would have been clearly probable had the new trial been granted.

Applications for new trial on the ground of newly discovered evidence are addressed to the sound legal discretion of the trial ⁴⁸⁷ judge, and his action thereon will not be disturbed on appeal, except for a clear and unmistakable abuse of such discretion. This court, in *State v. Brooks*, 23 Mont. 146, 161, 57 Pac. 1038, 1043, quotes with approval the following language from *People v. Demasters*, 109 Cal. 607, 42 Pac. 236: "We can see no abuse of discretion on the part of the court below in denying defendant's motion for a new trial, made upon the ground of newly discovered evidence. As has been repeatedly held by this court, a motion for a new trial is addressed to the sound legal discretion of the trial court, and the action of the latter will not be disturbed, except in an instance manifesting a clear and unmistakable abuse of such discretion. This rule is peculiarly applicable to an application based upon the ground of newly discovered evidence, which not only involves an enlarged discretion in the trial court, but has never been looked upon with favor, but rather with distrust: *Hobler v. Cole*, 49 Cal. 250; *Arnold v. Skaggs*, 35 Cal. 684. To entitle the plaintiff to a new trial on this ground, it must appear, among other things, that the new evidence be not cumulative merely; that it be such as to render a different verdict reasonably probable upon a retrial; and that the evidence could not with reasonable diligence have been discovered and produced at the trial: 1 Hayne on New Trial and Appeal, sec. 88." See, also, *Murray v. Heinze*, 17 Mont. 353, 358, 359, 42 Pac. 1057, 43 Pac. 714.

We are therefore of the opinion that the judgment and order appealed from be affirmed, and so advise.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

On the Probate of Lost Wills see Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274; Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591; Scott v. Maddox, 113 Ga. 795, 84 Am. St. Rep. 263; note to Tynan v. Paschal, 84 Am. Dec. 628-630. As a general rule, one who seeks to establish a lost or destroyed will assumes the burden of overcoming the presumption that it has been destroyed *animo revocandi*: Collyer v. Collyer, 110 N. Y. 481, 6 Am. St. Rep. 405.

If a Will cannot be Found on the death of the testator, it being last heard of while in his possession, the presumption is that it was destroyed by him *animo revocandi*: Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591; Scott v. Maddox, 113 Ga. 795, 84 Am. St. Rep. 263. As to whether his declarations are admissible to destroy or support this presumption, see Behrens v. Behrens, 47 Ohio St. 323, 21 Am. St. Rep. 820; Woodruff v. Handley, 127 Ala. 640, 85 Am. St. Rep. 145; note to Tynan v. Paschal, 84 Am. Dec. 628-631.

In Deciding Motions for New Trials on account of newly discovered evidence, courts have found it necessary to apply somewhat stringent rules to prevent the endless mischief which a different course would produce: Linscott v. Orient Ins. Co., 88 Me. 497, 51 Am. St. Rep. 435. The affidavit must set forth the facts constituting diligence in obtaining the evidence at the time of the trial: Boot v. Brewster, 75 Iowa, 631, 9 Am. St. Rep. 515. See, too, Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 54 Am. St. Rep. 114. And the new evidence must not be merely cumulative, but rather of such a character as to render a different verdict probable on a retrial: Linscott v. Orient Ins. Co., 88 Me. 497, 51 Am. St. Rep. 435; Whipple v. New York etc. R. R. Co., 19 R. I. 587, 61 Am. St. Rep. 796; Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62; Chicago etc. Ry. Co. v. Calumet Stock Farm, 194 Ill. 9, 88 Am. St. Rep. 68. The granting or refusing of the new trial rests largely in the discretion of the trial court: Clithero v. Fenner, 122 Wis. 356, 106 Am. St. Rep. 978.

ADMISSIBILITY OF THE DECLARATIONS OF A TESTATOR TO SUSTAIN, DEFEAT, OR AID IN THE CONSTRUCTION OF HIS ALLEGED WILL.

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I. General Divisions of the Subject.

The questions usually presented, where an alleged will is drawn in question, are: 1. Was it executed by the supposed testator as and for his will and in conformity with the requirements of the law? 2. If so executed, was he possessed of sufficient testamentary capacity? 3. If he had the proper testamentary capacity, was his act the result of such duress, fraud, or other undue influence that the will will not be received and carried out as testamentary; and 4. If the will was properly executed and not infected with undue influence or want of sufficient testamentary capacity, did it continue unrevoked at the time of the testator's death? 5. Where the validity of the will is conceded, but doubt remains respecting the intent of the testator after considering all the provisions of his will, his declarations may in rare instances be admissible to assist in removing such doubt. Upon all the first four questions here suggested declarations of testators may be offered, and in most, if not all, may be received either to support or overthrow the will. The reception is, nevertheless, for a very limited purpose, and the object of this note is to present the general rules upon the subject and the exceedingly important limitations thereto.

II. Where Part of the Res Gestae.

The rule permitting the admission of declarations when they form a part of the res gestae is necessarily applicable to wills. Except where the will is holographic, it must have been acknowledged by the testator in the presence of witnesses whom he must have requested to subscribe it as such, and whatever the testator says, at the time of the alleged execution, to the witnesses of his will is admissible, whether bearing on the fact of execution or tending to show the condition of his mind or his testamentary capacity, or that his action is or is not the result of his free will or of undue influence: *Roberts v. Frawick*, 13 Ala. 68; *Marston v. Marston*, 17 N. H. 503, 43 Am. Dec. 611; *Smith v. Fenner*, 1 Gall. 170, Fed. Cas. No. 13,046. The declarations of a testator made either before or after the execution of his will are, however, not a part of the res gestae, and are not admissible as such, though they but a few days preceded or followed such execution: *Comstock v. Hadlyme Ecc. Soc.*, 8 Conn. 244, 20 Am. Dec. 100; *Bunkle v. Yates*, 11 Ind. 95; *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. Rep. 475, 45 L. ed. 663.

III. Relating to the Fact of the Execution of the Will.

Where the execution of a will is sought to be proved or disproved, the issue presented may involve the inquiry whether the paper claimed to have been executed as a will is a forgery, or though it is shown or conceded not to be a forgery, whether the acts in addition to the signing by the testator were such as to amount to a substantial compliance with the law controlling the execution of wills. There

are many cases containing the general statement that the declarations of a testator are not admissible to prove the execution of a will: *Succession of Eubanks*, 9 La. Ann. 147; *Collins v. Elliott*, 1 Har. & J. 1; *Johnson v. Hicks*, 1 Lans. 150; *Jackson v. Betts*, 6 Cow. 377; *Kennedy v. Upshaw*, 64 Tex. 411; and other and equally numerous decisions affirming that, in opposition to evidence showing the execution of a will, the declarations of a testator are inadmissible though to the effect that he had made no will and intended to die intestate: *Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33; *Wells v. Wells*, 144 Mo. 198, 45 S. W. 1095; *In re Pemberton's Will*, 40 N. J. Eq. 520, 4 Atl. 770; *Pemberton v. Pemberton*, 41 N. J. Eq. 349, 7 Atl. 642; *In re Laylor's Will*, 86 App. Div. 527, 83 N. Y. Supp. 726; *In re Hopkin's Will*, 35 Misc. Rep. 702, 72 N. Y. Supp. 415. Nevertheless, the question is not altogether free from doubt. The evidence offered does not usually include declarations made by the alleged testator directly affirming or denying the alleged forgery. More usually the evidence relates to declarations respecting intended testamentary dispositions from which, if the evidence were received, the court or jury might rationally reach a conclusion as to the probability or improbability of the forgery. In our judgment, the declarations of an alleged testator, when if received they would corroborate other evidence before the court to prove or disprove the genuineness of the signature, should be regarded as admissible, and more especially when the will is holographic and must be admitted to probate, or probate thereof denied on testimony relating solely to whether it is in the handwriting of the testator. With respect to such wills, while the law sanctions them, it leaves them dependent on the opinion of witnesses as to whether the will is wholly in the handwriting of the testator, and where there is evidence on both sides of this issue, it would appear that declarations of a testator tending to either strengthen or weaken the probability that the instrument is in his handwriting ought to be received. We cannot find, however, that with respect to the subject here under consideration any distinction has been recognized between holographic and duly witnessed and attested wills. In the case of both, the decisions, so far as number is concerned, favor the admission of declarations of the testator tending to show the execution or nonexecution of the will: *Succession of Morvant*, 45 La. Ann. 207, 12 South. 349; *Hoppe v. Byers*, 60 Md. 381; *In re Taylor's Will*, 10 Abb. Pr., N. S., 300; *Swope v. Donnelly*, 190 Pa. St. 417, 70 Am. St. Rep. 637, 42 Atl. 882; *Johnson v. Brown*, 51 Tex. 65; *Turner v. Hand*, 3 Wall. Jr. 88, Fed. Cas. No. 14,257. The argument that the admission of such evidence ought to be denied on the ground that it invites, and must lead to the commission of, perjury seems entitled to little consideration in the case of holographic wills, which are by statute declared valid when shown to be wholly in the handwriting of the testator. Whether they are in such writing must usually, if not al-

ways, be proved solely by parol testimony, and what is worse still, in many cases, by the testimony of professional experts. As it is the policy of the law to permit the sustaining or overthrowing of alleged wills by parol testimony, the fear and possibility of perjury does not seem to warrant the exclusion of the declarations of the person whose alleged will is in question, and which declarations, in many instances, must be material, if not conclusive, on the question. It must be admitted, however, that at the present time the judicial pendulum is swinging in the opposite direction, and unless soon stayed, must reach a point whence all declarations of a decedent not constituting a part of the *res gestae* of the execution of his alleged will must be excluded from evidence where there is no doubt of the condition of his mind or testamentary capacity and of his freedom from undue influence: *In re Gregory's Estate*, 133 Cal. 131, 65 Pac. 315; *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008; *Boylan v. Meeker*, 28 N. J. L. 274; *In re Gordon's Will*, 50 N. J. Eq. 397, 26 Atl. 268; *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. Rep. 474, 45 L. ed. 663.

Turning to the cases where there was no issue as to the genuineness of the signature of the testator and the question involved related to the manner of the execution of the will in other respects, we find a like conflict in the authorities and a like majority in favor of the admission of his declarations. Thus, in *Scott v. Hawk*, 105 Iowa, 467, 75 N. W. 368, where it was shown that the subscribing witnesses to the will were all dead, the evidence of an attorney was received to the effect that the deceased, on being shown the will in his lifetime and examining the signatures, pronounced it his will, the court saying, "that the decedent, upon an examination of the instrument and the signatures thereto, declared it his will is convincing evidence of its execution by him." So, in *Beadles v. Alexander*, 9 Baxt. 604, after proof of the signatures of the testator and of the witnesses and receiving the testimony of one of them that, to the best of his knowledge, the testator was not present when the will was witnessed, evidence was offered and received to the effect that the testator had said that he executed the will in the presence of both the subscribing witnesses, and that they had then attested it at his request. The supreme court said: "These statements of the testator were objected to, and the question is, Were they properly admitted? After careful consideration, we are of opinion they were. It is true it is laid down in *Redfield on Wills*, as the result of the authorities, that statements of the testator, not parts of the *res gestae* and not showing the state of the testator's mind, but statements introduced merely to establish a particular fact by the force of the admission are hearsay testimony and not admissible. But a *prima facie* case arises upon proof of the handwriting of the subscribing witnesses, and it is conceded that when the subscribing witnesses fail to prove the due execution

of the will by the testator, that they may be contradicted or impeached, and the fact established by other testimony. The statements of the testator to this direct point do but most strongly establish the fact. They do not stand as mere hearsay declarations of other parties. They are the declarations of the testator as to his own acts, and about which he must certainly know, and in general he has no motive to speak falsely, and both parties claim under him, one as devisee or legatee, the other as distributee and heir. His declarations are not introduced to establish the particular fact by force of the admissions or statements alone, but for the purpose of corroborating and supporting the presumption arising from the fact that the will bears the genuine signatures of two competent subscribing witnesses and to contradict the testimony of the witness who, although he admits his signature, yet denies the testator's presence." A like result followed in *Re Oliver's Will*, 13 Misc. Rep. 466, 34 N. Y. Supp. 706, 25 Civ. Proc. 25. On the other hand, the supreme court of Missouri in *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701, felt compelled to reverse a judgment in favor of a will on the sole ground that the evidence of declarations of the decedent had been received for the purpose of showing that, though he did not sign the will himself, it was signed in his presence and by his direction, that mode of signing being authorized by the statute of the state.

IV. Upon the Question of Condition of Mind or Testamentary Capacity.

The one point upon which the authorities agree is that declarations of a decedent, oral or written, whether made at, before, or after the execution of his alleged will, are admissible for the purpose of showing his mental condition enabling the court or jury to determine his testamentary capacity: *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Comstock v. Hadlym Ecc. Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Ball v. Kane*, 1 Penne. 90, 39 Atl. 778; *Mallery v. Young*, 94 Ga. 804, 22 S. E. 142; *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410; *Lucas v. Cannon*, 13 Bush, 650; *Wise v. Foote*, 81 Ky. 10; *Morris v. Morton's Ex.* (Ky.), 20 S. W. 287; *Oberdorfer v. Newberger* (Ky.), 67 S. W. 267; *Roberts v. Bidwell*, 136 Mich. 191, 98 N. W. 1000; *Sheehan v. Kearney* (Miss.), 21 South. 41, 35 L. R. A. 102; *Crowson v. Crowson*, 178 Mo. 691, 72 S. W. 1065; *Pattee v. Whitecomb*, 72 N. H. 249, 56 Atl. 459; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; *In re Brunor*, 21 App. Div. 259, 47 N. Y. Supp. 681; *In re Woodward*, 167 N. Y. 28, 60 N. E. 233; *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519; *Herster v. Herster*, 122 Pa. St. 239, 9 Am. St. Rep. 95, 16 Atl. 342; *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611; *Robinson v. Hutchinson*, 26 Vt. 38, 60 Am. Dec. 298. If his declarations or acts tended to show that he was a maniac, there could be no doubt of the admissibility of evidence of them, but usually the questions presented are not so extreme in character. A testator may be

without the requisite testamentary capacity though not a maniac, and may have such capacity though in certain places or occasions he may have done acts or made statements or other declarations apparently incompatible with sanity. Hence, it is often proper to show facts bearing, though somewhat remotely, on the question of testamentary capacity. The disposition made of his property by a testator may seem strange and yet may have been the result of a testamentary purpose formed when he was confessedly of unquestionable testamentary capacity, and this may be established by receiving in evidence preceding wills in which the same, or substantially the same, testamentary purpose was expressed: *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Nieman v. Schnitker*, 181 Ill. 400, 55 N. E. 151; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510. Generally it may be affirmed that all declarations by a testator respecting the disposition of his property which at the time he intended to make are admissible to show either that the disposition made in his will conformed to his purpose so expressed or deviated substantially therefrom, and may lead the jury to the conclusion that what he did in the one case was the result of a testamentary purpose formed in his mind when undoubtedly sane, and in the other is at unaccountable variance with such purpose, and may, therefore, have been the product of an insane delusion or of some other operation of a disordered mind: *Williamson v. Nabers*, 14 Ga. 285; *Hill v. Bahrns*, 158 Ill. 314, 41 N. E. 912; *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Goodbar v. Lidikey*, 136 Ind. 1, 43 Am. St. Rep. 296, 35 N. E. 691; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Renand v. Pageot*, 102 Mich. 568, 61 N. W. 3; *Hammond v. Dike*, 42 Minn. 273, 18 Am. St. Rep. 503, 44 N. W. 61; *Den v. Vancleve*, 5 N. J. L. 589; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Tunison v. Tunison*, 4 Brad. Sur. 138; *McTaggart v. Thompson*, 14 Pa. St. 149; *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64; *McMechem v. McMechem*, 17 W. Va. 683, 41 Am. Rep. 682.

The question of the testator's knowledge of the contents of his will may also be material for the purpose of aiding the determination of the question of his testamentary capacity, though it is more frequently presented when the will is claimed to have been procured by fraud or to be the offspring of undue influence. In either case it is proper to prove his declarations showing that he had such knowledge, and to thereby rebut the claim that he acted without testamentary capacity or in obedience to a will other than his own: *Davis v. Rogers*, 1 Houst. 44; *Reel's Exr. v. Reel*, 8 N. C. 248, 9 Am. Dec. 632; *In re Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013; *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253; *Harleston v. Corbett*, 12 Rich. 604.

The state of the testator's affection toward one of his children or other heirs may also be material as bearing upon his testamentary

capacity, for it may show a disposition of his property to be not irrational, which, in the absence of evidence upon this subject, might be attributed to an insane mind, and his declarations are always admissible upon this subject, because they may tend to show why an heir or other person was excluded from his will or made a special object of his bounty: *Kilpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819.

The declarations offered may also bear upon some other issue as to which they are clearly inadmissible. Thus, they may tend to show not only want of testamentary capacity, but also the controlling presence of undue influence. They are not on that ground inadmissible. If it is claimed that the testator was without the requisite testamentary capacity, his declaration made subsequent to the execution of the will that he had to make it as he did to have peace at home is admissible to show his mental condition, and if the proponents of the will fear that the reception of the testimony may operate prejudicially to them on the issue of undue influence, their only remedy is to have the jury instructed that it must be considered by them solely on the question of mental capacity: *Peery v. Peery*, 94 Tenn. 328, 29 S. W. 1. This remedy, it must be admitted, is rarely adequate.

V. Upon the Issue of Fraud or Undue Influence.

a. To Show Acts of.—The decisions are well-nigh unanimous in affirming that the declarations of a testator are not admissible for the purpose either of proving or disproving acts of undue influence over him, or the exercise of fraud whereby his will is claimed to have been procured: *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Appeal of Vivian*, 74 Conn. 257, 50 Atl. 797; *Jones v. Grogan*, 98 Ga. 552, 25 S. E. 590; *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788; *Hayes v. West*, 37 Ind. 21; *Wall v. Dimmitt*, 114 Ky. 923, 72 S. W. 300; *Griffith v. Diffenderfer*, 50 Md. 466; *Zibble v. Zibble*, 137 Mich. 655, 92 N. W. 348; *Bush v. Bush*, 87 Mo. 480; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526; *In re Pemberton*, 40 N. J. Eq. 520, 4 Atl. 770; *Le Bau v. Vanderbilt*, 3 Redf. Sur. 384; *In re Palmateer's Will*, 78 Hun, 43, 28 N. Y. Supp. 1062; *Marx v. McGlynn*, 4 Redf. Sur. 455, 88 N. Y. 357; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16; *Earp v. Edgington*, 107 Tenn. 23, 64 S. W. 40; *McElroy v. Phink* (Tex. Civ. App.), 76 S. W. 753; *Townson v. Moore*, 11 App. D. C. 377. Hence, it is not permissible to receive in evidence his declarations to the effect that certain persons influenced him by threats or importunities, or statements concerning persons who were made the special objects of his bounty, or, on the other hand, were excluded therefrom, or that other means were employed tending to restrain his free action, or in any other respect to produce a will which cannot be justly regarded as his own: *Caulkin's Estate*, 112 Cal. 294, 44 Pac. 577; *Gregory's Estate*, 133 Cal. 131, 65 Pac. 315; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W.

1127; *Defoe v. Defoe*, 144 Mo. 458, 46 S. W. 433; *Rusling v. Bualing*, 36 N. J. Eq. 603; *Pemberton v. Pemberton*, 41 N. J. Eq. 349, 7 Atl. 642; *Jackson v. Kniffen*, 2 Johns. 31, 3 Am. Dec. 390; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16; *Robinson v. Hutchinson*, 26 Vt. 38, 60 Am. Dec. 298. Nor can undue influence be established by evidence of the declarations of the testator showing the denial by him of the fact that he had made a will or expressing a testamentary purpose inconsistent with the will in question: *In re Storer's Will*, 28 Minn. 9, 8 S. W. 827; *Barker v. Barker*, 36 N. J. Eq. 259; *Manogue v. Herrell*, 13 App. D. C. 455. There is, it must be admitted, one decision to the effect that declarations of a testator made before the execution of his will are admissible for the purpose of proving fraud in procuring it: *Roberts v. Trawick*, 17 Ala. 55, 52 Am. Dec. 164. It has not been followed elsewhere so far as we can ascertain, and undoubtedly it is opposed to the decided weight of authority on the subject: *Moore v. McDonald*, 68 Md. 321, 12 Atl. 117; *Kitchell v. Beach*, 35 N. J. Eq. 446; *Howell v. Barden*, 3 Dev. 548. A number of decisions may be found which on first impression seem not entirely reconcilable with what we have said concerning the inadmissibility of a testator's declarations for the purpose of proving acts of undue influence. All, with the possible exception of *In re Last Will of Hollingsworth*, 58 Iowa, 526, 12 N. W. 590, and *Parsons v. Parsons*, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564, were, in truth, only in support of the proposition set out in the subdivision following this, that such declarations are not admissible in evidence for the purpose of establishing acts of undue influence, but there being other evidence tending to show such facts, then the declarations of the testator are admissible for the purpose of showing that he was susceptible to the influence attempted to be exercised over him.

b. **To Show the Condition of the Testator's Mind and That It was Susceptible to Undue Influence.**—We have already stated that the declarations of a testator, though made before or after the execution of his will, are admissible as bearing on the condition of his mind and his testamentary capacity. Undue influence, short of actual coercion, can rarely produce the effect desired on a person in full physical and mental health, and where a will is claimed to be the product of undue influence, the claim must ordinarily be supported by evidence sufficient not merely to establish the influence, but further, to indicate that the mind of the testator was susceptible to it. Hence, all declarations of a testator tending to show such susceptibility are admissible, as where they disclose a testamentary purpose at variance with that expressed in the will, or make direct claims that the will does not express the testator's wishes and attribute this to the influence exercised over him by others, or where he admits or affirms the domination of certain persons over him and his inability to re-

sist it: *Dennis v. Weeks*, 51 Ga. 24; *Stephenson v. Stephenson*, 62 Iowa, 163, 17 N. W. 456; *In re Goldthorp's Estate*, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845; *Lucas v. Cannon*, 13 Bush, 650; *Jones v. McLellan*, 76 Me. 49; *Shailer v. Bumstead*, 99 Mass. 112; *Potter v. Baldwin*, 133 Mass. 427; *Beaubien v. Cicotte*, 12 Mich. 459; *In re Hess' Will*, 48 Minn. 504, 31 Am. St. Rep. 665, 51 N. W. 614; *Rusling v. Rusling*, 35 N. J. Eq. 120; *Rambler v. Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444; *Robinson v. Robinson*, 203 Pa. St. 400, 53 Atl. 253; *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W. 98; *Campbell v. Barrera* (Tex. Civ. App.), 32 S. W. 724; *Bryant v. Pierce*, 95 Wis. 331, 70 N. W. 297. His declarations, it is said, do not of themselves establish undue influence or fraud, but they do tend to show what manner of man he was when making them, and may, in connection with other evidence, convince the jury that the will in question is fatally infected with undue influence.

c. **To Rebut the Claim of Undue Influence.**—Where evidence is offered and received tending to prove undue influence, it is, of course, permissible to receive counter-evidence, and such counter-evidence is not restricted to proving that the acts of undue influence testified to did not occur, but may extend to proving every other fact from which it may be reasonably inferred that, whether undue influence was exercised or not, the will in question is not the result of that influence and that the testamentary purposes expressed therein are those of the testator and not due to the submission of his will or judgment to the will of another. What these testamentary purposes were are inferable from his declarations both before and after the execution of the will, and those declarations are admissible where, when made before such execution, they show an intention to make a disposition of his property conforming to that expressed in the will, or to exclude from his bounty his heirs at law, or some of them: *Roberts v. Trawick*, 17 Ala. 55, 52 Am. Dec. 164; *Appeal of Dennison*, 29 Conn. 399; *Kaenders v. Montagu*, 180 Ill. 300, 54 N. E. 321; *Dye v. Young*, 55 Iowa, 433, 7 N. W. 678; *Stephenson v. Stephenson*, 62 Iowa, 163; *Gardner v. Frieze*, 16 R. I. 640, 19 Atl. 113; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16; or when made after the execution, they show that he understood the will and was satisfied with it: *Moore v. Gubbins*, 54 Ill. App. 163; or disclosed reasons for the disposition of his property made therein: *Wood v. Sawyer*, 61 N. C. 251. Generally, it may be affirmed that all declarations made by a testator in harmony with his will, whether before or after its execution, are admissible to repel the inference that it was the product of undue influence exercised over him. Nor need these declarations in express terms relate to the will. They may consist of statements of his feelings, affections, and emotions, and tend to show that the exclusion from his bounty of his heirs at law or others who would seem to be the natural objects of his solicitude, or that his

preferences given to one of such heirs over others, or his devise or bequest in favor of a stranger to his blood, were the expression of his testamentary purpose and not of his submission to influences exercised over him by another: *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 South. 687; *Harp v. Farr*, 168 Ill. 459, 48 N. E. 113; *Mooney v. Olsen*, 22 Kan. 69; *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628; *In re Munger*, 38 Misc. Rep. 268, 77 N. Y. Supp. 648; *Allen v. Public Administrator*, 1 Brad. Sur. 378; *O'Neil v. Murray*, 4 Brad. Sur. 311; *In re Metcalf's Will*, 16 Misc. Rep. 180, 38 N. Y. Supp. 1131; *In re Green's Will*, 20 N. Y. Supp. 538; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16; *Barbour v. Moore*, 4 App. D. C. 535.

VI. On Applications for the Probate of Lost Wills.

If it be true, as we have already stated, that declarations of a testator are not admissible to prove the fact of his execution of his alleged will under ordinary circumstances, there is no reason why the rule should not remain applicable when such will is claimed to be lost and, notwithstanding such loss, its admission to probate is sought: *Fuentes v. Gaines*, 25 La. Ann. 85; *Grant v. Grant*, 1 Sand. Ch. 235; *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619. Where, however, the execution of the will is proved, and the question is whether it continued in existence unrevoked at the time of the testator's death, notwithstanding it cannot be found, his declarations are admissible either to repel (*Matter of Page*, 118 Ill. 576, 59 Am. Rep. 395, 8 N. E. 852; *McDonald v. McDonald*, 142 Ind. 45, 41 N. E. 336; *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738; *Hamilton v. Crow*, 175 Mo. 634, 75 S. W. 389; *Clark v. Turner*, 50 Neb. 296, 69 N. W. 843, 38 L. R. A. 433; *Williams v. Miles (Neb.)*, 94 N. W. 705, 96 N. W. 151; *In re Cosgrove's Will*, 31 Misc. Rep. 422, 65 N. Y. Supp. 570; *Reeves v. Booth*, 2 Mill, 334, 12 Am. Dec. 679; *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619; *In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12; *Southworth v. Adams*, 11 Biss. 256, Fed. Cas. No. 13,194), or to support (*Weeks v. McBeth*, 14 Ala. 474; *Behrens v. Behrens*, 47 Ohio St. 323; *Baushett v. Keitt*, 22 S. C. 187; *Keen v. Keen*, L. R. 3 P. 105, 42 L. J. P. 61, 29 L. T. 247), the presumption of its destruction and revocation. That the declarations of a testator are admissible to prove that his lost will remained in existence and in force at the time of his death is denied in New York, the court saying: "The question is not entirely free from difficulty, but whatever doubt exists concerning the correct rule arises, not from the nature of the question itself, but from the views and expressions to be found in some of the adjudged cases. The fact in issue was whether the instruments in question were physically in existence at the time of the death of the testatrix, and if not, whether they had been fraudulently destroyed during her life. If the evidence offered did not prove or

tend to prove this issue, it was properly excluded. If the existence of a will may be established by proof of the declarations of the deceased, then it is difficult to see why the execution and contents of the instrument may not be established by like proof, providing two or more witnesses testify to the declarations, and thus testamentary dispositions of property would be established wholly by oral evidence consisting entirely of the declarations of the deceased. It is true that in the present case there is no dispute with respect to the execution or contents of the will, but if the principle is established that the existence of the will at the time of death may be shown by oral proof of such declarations, it must follow that any other fact required by the statute may be shown in like manner. The principle involved in the question, therefore, is whether the oral statements or declarations of a party before death are admissible to establish a testamentary disposition of property. The contention of the learned counsel for the proponents is that they prove, or tend to prove, that the deceased had no intention to revoke her will, and hence that it was in existence at the time of her death. However plausible this proposition may seem, it asserts a rule of evidence which is open to the objection that, through its complete operation, a will or codicil may be established without the production of any writing whatever. The rule could not in reason be limited to a case like this where there is proof of the execution by the deceased of a written will, since the declarations of the deceased that a will had been executed are of as much probative force as declarations that it had not been revoked. We think the declarations of the deceased were not competent to prove that the will or codicil was in existence at the time of her death. The whole course of legislation in this state from the earliest times to the present day concerning the execution or revocation of wills discloses a clear purpose to substitute in all cases written for oral proof of the testamentary disposition of property and to sweep away all parol proof of testamentary intentions, and hence to exclude statements or declarations of the deceased': *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442. It will be seen that these views were approved in the principal case, ante, p. 439. Whether the contents of an alleged lost will can be proved solely by the declarations of the testator is doubtful. That such declarations are admissible in connection with other evidence is quite well established: *Muller v. Muller*, 108 Ky. 511, 56 S. W. 802; *Clark v. Turner*, 50 Neb. 290, 64 N. W. 843, 38 L. R. A. 433; *Williams v. Miles* (Neb.), 94 N. W. 705, 96 N. W. 151; *Woodward v. Goldstone*, L. R. 11 App. Cas. 469, 35 W. R. 337, 56 L. J. Prob., N. S., 1; but these decisions indicate that the contents of the will cannot be established by those declarations alone.

VII. On the Question of Revocation.

As a will cannot be revoked by words alone, the declarations of a testator that he has revoked his will, or intends to do so in the future,

are clearly inadmissible in the absence of evidence of any revocatory act: *Slaughter v. Stephens*, 81 Ala. 418, 2 South. 145; *Woodruff v. Hundley*, 127 Ala. 640, 85 Am. St. Rep. 145, 29 South. 98; *Kirkpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819; *Smith v. Fenner*, 1 Gall. 170, Fed. Cas. No. 13,046. Hence, the declarations of a testator are not admissible to prove that he executed his will in duplicate and destroyed one part with the intention of revoking it: *Manatt v. Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717. Probably an exception may be maintained where it satisfactorily appears that the testator did an act with the intent to effect a revocation, but by fraud or deceit practiced upon him the act in fact done was entirely different from the act intended, as where he, after placing his will in a drawer with a red ribbon tied around it, went to that drawer and took out what appeared to be his will, and burned it, some person having, however, removed the will without the testator's knowledge and substituted another paper for it having like exterior appearance. In such a case, it is said, that the testator's declarations are admissible to prove the revocation of the will: *Smiley v. Gambill*, 2 Head, 164. The declarations of a testator to the effect that he has made no will (*Toebbe v. Williams*, 80 Ky. 661), or that he intends to die intestate (*Lewis v. Lewis*, 2 Watts & S. 455), are not admissible to establish the revocation of his will. His declarations, that he had canceled or destroyed his will for the purpose of revoking it, are inadmissible where, after his death, such will is found not to be destroyed nor canceled: *Meeker v. Boylan*, 28 N. J. L. 274. If, on the other hand, it is not found after his death, his declarations, as we have already shown, are admissible to support the presumption that the will was destroyed by him with revocatory intent: *Ante*, subd. VI; *Betts v. Jackson*, 6 Wend. 173; *Behrens v. Behrens*, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209; *Youndt v. Youndt*, 3 Grant's Cas. 140; *Gardner v. Gardner*, 177 Pa. St. 218, 35 Atl. 558; *Bauskett v. Keitt*, 22 S. C. 187. Nor can the revocation of one will by the execution of another and later will be shown by the testator's declarations. This is necessarily true, for, as the alleged later will cannot be established so as to entitle it to admission to probate by the mere declarations of the testator that he executed it, it cannot, because of such declarations, operate to annul a pre-existing will: *Caemon v. Van Harke*, 33 Kan. 333, 6 Pac. 620; *Allen v. Jeter*, 6 Lea, 672. A will may be found after the testator's death at a place or in a condition tending to indicate that such place or condition is due to an act done by him for the purpose of revoking it, and where such is the case, his declarations are probably admissible when they tend to prove that he intended to revoke, and understood that he had revoked, his will: *Patterson v. Hickey*, 32 Ga. 156; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Harring v. Allen*, 25 Mich. 505; *Throckmorton v. Holt*, 12 App. D. C. 552. Certainly, however, doubt remains

respecting the cases to which this rule is applicable. Thus, where a will was forwarded by some unknown persons to the register of wills, and when received by him, it appeared to have been mutilated, torn, and burned at the edges, and it was conceded that if it had been found in that condition among the papers or repositories of the decedent, a presumption would have arisen in favor of its revocation, it was held to have been error to admit in evidence declarations of the decedent, not part of the *res gestae*, for the purpose of showing that the will had been revoked by him. "This evidence," said the supreme court of the United States, "is claimed to be admissible for the purpose of authorizing the inference that the testator himself mutilated or directed the mutilation of the will for the purpose of thereby revoking it. The declarations made by a testator at the time of mutilation or cancellation going to show the intent with which the act is done are, of course, admissible, being part of the *res gestae*. But as the production of the will under the circumstances proved in this case created no presumption of revocation, it was necessary to prove that the act of mutilation was performed by the testator or by his direction and with an intention to revoke, and we think that his declarations, though being a part of the *res gestae*, cannot be admitted for the purpose of asking the jury to infer therefrom that the testator not only performed or directed the act of mutilation, but did so with an intent to revoke the instrument. This kind of evidence is of the most dangerous character. It is hearsay and nothing more": *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. Rep. 474, 45 L. ed. 663.

Declarations of a testator are, however, we think, admissible to rebut a presumption of revocation which otherwise must be indulged. So far as this subject is involved in the case of lost wills, we have hereinbefore considered it in subdivision VI. It has been held, but we think the doctrine questionable, that a testator, after executing a second will, may declare that both it and the preceding will are to remain in force, and that such declaration may be received in evidence to rebut the intended revocation: *Lyon v. Fiske*, 1 La. Ann. 444. A will may be so mutilated that, in the absence of evidence to the contrary, it must be presumed to have been revoked by the testator. May his declarations be received to repel this presumption by engendering the inference that the act of spoliation was probably that of another person? In *Tucker v. Whitehead*, 59 Miss. 594, it was held that evidence had been properly received of the declarations of a decedent, extending over a period of eighteen months, commencing at the date of the will and continuing until four days before he died, relating to the fact of his having made a will and of its contents, and of his affection for his niece, and of his testamentary intentions and desires, and what he had done to make them effective, where the pur-

pose of the evidence was to support the inference that the mutilation of the will had been an act of others than the testator. The court said: "Whatever may be the true rule where the act which the law accepts as itself evidence of a revocation is undoubtedly shown to have been done by the testator, we think it clear that testimony such as was offered here should always be received where, as in this case, it is uncertain whether the act was committed by the testator, or was the unauthorized or criminal act of a spoliator. The law makes the destruction or mutilation of a will by the testator sufficient evidence of a design to revoke it, and whether any declarations by him, other than those which accompany the act and thereby become a part of the *res gestae*, should be receivable in evidence, to contradict or explain the act, may well admit of doubt; but where the fact that he was the author of the destruction or mutilation is itself first presumed, from the place where the paper is found, and upon this presumption there is built up the further presumption that it was done *animo revocandi*, it would seem that something more than presumptions should be let in. In such a case it is the part of wisdom to open the doors as wide as possible for the reception of every species of evidence at all calculated to advance the discovery of truth, since not to do so must in a great number of cases result in defeating the will of the deceased by accident or fraud. The evils which may spring from the introduction of parol proof in such a case are less than those which must be wrought by its exclusion."

VIII. To Show Whether One Will was Revived on the Revocation of Another.

The general subject whether and when the revocation of one will operates to revive another and earlier has been considered in note to *Graham v. Burch*, 28 Am. St. Rep. 355. Whether declarations of a testator are admissible to aid in determining the question is not well settled. In a very early case it was said that his declarations while destroying a later will that he did not thereby intend to revive an earlier were admissible to show that no revivor was to take place: *Boudinot v. Bradford*, 2 Dall. 266, 1 L. ed. 375. This ruling may, perhaps, be sustained on the ground that the declarations constituted part of the *res gestae*. In Massachusetts, on the other hand, declarations are admissible to show that by the revocation of a later will he did intend to revive an earlier, though, in the absence of such declarations, no such intention would be imputed to him: *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Williams v. Williams*, 142 Mass. 515, 8 N. E. 424.

IX. To Show that a Child was Intentionally Omitted from a Will.

Under the statutes of the different states permitting the child or the issue of a deceased child of a testator to inherit its share of his estate, unless its omission from his will appears to be intentional, a

difference of opinion has arisen whether such intention must be manifest on the face of the will or may be proved by extrinsic evidence: *Notes to Wilson v. Fosket*, 39 Am. Dec. 740, and *Chappell v. Missionary Soc.*, 50 Am. St. Rep. 284. In those states where extrinsic evidence is admissible it may include testimony of the declarations of the testator: *Whittemore v. Russell*, 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197; *Wilson v. Fosket*, 6 Met. 400, 39 Am. Dec. 736; *Converse v. Wales*, 4 Allen, 512; *Coutam v. Doull*, 133 U. S. 216.

X. To Aid in the Construction of a Will.

It is scarcely necessary to observe that the meaning of a will, or, in other words, the testator's intent, must be sought solely in the writing itself, and that nothing said by him either before, after, or at the very time of its execution can add to or vary its terms or reconcile its conflicting provisions: *In re Gilmore*, 81 Cal. 240, 22 Pac. 665; *Kirkland v. Conway*, 116 Ill. 438; *McCray v. Lipp*, 35 Ind. 116; *Denfield, Petitioner*, 156 Mass. 365, 30 N. E. 1018; *Magee v. McNeil*, 41 Miss. 17, 90 Am. Dec. 354; *Williams v. Vreeland*, 32 N. J. Eq. 734; *Comfort v. Mather*, 2 Watts & S. 450, 37 Am. Dec. 523; *Lewis v. Douglass*, 14 R. I. 604; *Read v. Payne*, 3 Call. 225, 2 Am. Dec. 550; *McClure v. Evans*, 29 Beav. 422; *Charter v. Charter*, L. R. 7 H. L. 364, 43 L. J. P. 73. Nor is the rule rendered inapplicable by the fact that what he says is in writing by him subscribed, if not executed in a manner entitling it to admission to probate as a part of his will: *Best v. Berry*, 189 Mass. 510, 109 Am. St. Rep. 000, 75 N. E. 743. His declarations may, however, be received to aid in the construction of his will where they tend to remove or explain a latent ambiguity relating to the persons or property attempted to be named or described therein: *Vandiver v. Vandiver*, 115 Ala. 328, 22 South. 154; *Brownfield v. Brownfield*, 12 Pa. St. 136, 51 Am. Dec. 590; *Morgan v. Burrows*, 45 Wis. 201, 30 Am. Rep. 717; *Blake v. Marnell*, 2 Barn. & C. 35, 12 R. R. 68.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

HALL v. MISENHEIMER.

[137 N. C. 183, 49 S. E. 104.]

FRAUDS, STATUTE OF—Name of the Party to be Charged Appearing Only in the Body of the Receipt.—If the name of the party to be charged appears in the memorandum, so as to be applicable to the whole substance of the writing, and was written by him or his authorized agent, it is immaterial where in the instrument the name happens to be placed, whether at the top or at the bottom, or merely mentioned in the body of the memorandum. (p. 475.)

FRAUDS, STATUTE OF—Writing of Name of Party at His Direction.—If the name of a party is written in a memorandum at his direction, he is bound. It is not material that such direction was by parol. (pp. 475, 476.)

FRAUDS, STATUTE OF—Memorandum, Sufficiency of.—To charge a party by a contract, the memorandum or other writing relied on must contain expressly or by implication all the material terms of the agreement. (p. 476.)

FRAUDS, STATUTE OF.—The Doctrine of Part Performance is not Recognized by the Courts of North Carolina. The fact that a purchaser of real property paid a small amount on the purchase price and took possession does not render the contract enforceable against him when there is no sufficient memorandum in writing thereof. (p. 477.)

FRAUDS, STATUTE OF.—The Party to be Charged is the defendant in the action, or the one against whom it is sought to enforce the obligation of the contract. (p. 477.)

STATUTE OF FRAUDS —Memorandum, When Must Show the Price to be Paid.—In an action against an alleged vendee of real property to recover the purchase price, such price must appear from the memorandum, and cannot be established by parol. (p. 478.)

Action to recover the purchase price on an alleged sale of land. The memorandum of sale was written by M. C. Ruffty at the request and at the direction of the defendant, and was as follows:

“Salisbury, N. C., January 18, 1904.

“Received from M. J. Misenheimer five dollars, part payment on one five-room house and lot, extending across Tar branch, on Boundary street, No. house, 630.

“(Signed) J. A. HALL.

“Witness: M. D. LEFLER.”

The defendant took possession of the property, but subsequently refused to accept a conveyance or pay the purchase price, claiming in his answer that he was to have until the twentieth day of January, 1904, to determine whether he would take the property or not, and that before that time he notified the plaintiff that he would not take it. At the close of the plaintiff's testimony, the court, on motion of the defendant, directed a judgment of nonsuit. The plaintiff appealed.


Walter H. Woodson, for the plaintiff.

Burton Craige and Walter Murphy, for the defendant.

¹⁸⁵ WALKER, J. The argument in this court proceeded mainly upon the question whether there had been a sufficient signing of the receipt, under the statute of frauds, to bind the defendant. Upon this point our opinion is with the plaintiff. It has been held in England, whose statute (29 Charles II) has been substantially copied by us, that if the name of the party to be charged appears in the memorandum, so as to be applicable to the whole substance of the writing, and was written by the said party, or by his authorized agent, it is immaterial where in the instrument the name happens to be placed, whether at the top or at the bottom, or whether it is merely mentioned in the body of the memorandum, the statute not requiring that the name should be subscribed: *Evans v. Hoare*, [1892] 1 Q. B. 593. The principle, as thus stated, has been adopted by Clark in his work on Contracts, second edition, page 89, and he cites numerous cases to sustain it. To those he cites may be added *Higdon v. Thomas*, 1 Har. & G. 138. We think the same rule has been approved by this court in *Plummer v. Owens*, 45 N. C. 254, in which case it appeared that the names of the vendor and the vendee were written at the top of the memorandum, the latter being in the form of an account. The court held that the memorandum would have been sufficient in other respects if the description of the land had been more specific. See, also, *Clason v. Bailey*, 14 Johns. 484, and the other cases cited in Clark on Contracts, 2d ed., p. 89, note 110. In our case the name of the vendee was inserted in the paper by his own direction, and it cannot be questioned that he fully intended thereby to bind himself by the receipt as

evidence of a contract to buy the land, so far as a signing of the writing was necessary for that purpose. *Cherry v. Long*, 61 N. C. 466, ¹⁸⁶ seems to be directly in point. It was not contended that the defendant was not bound by what his agent did in writing the receipt, though the latter's authority was given by parol: *Neaves v. Mining Co.*, 90 N. C. 412, 47 Am. Rep. 529.

But we think there is a serious obstacle in the way of plaintiff's recovery. The statute expressly requires a contract to sell land, or some note or memorandum thereof, to be put in writing and signed by the party to be charged therewith or by his lawfully authorized agent: Code, sec. 1554. In order, therefore, to charge a party upon such a contract, it must appear that there is a writing containing expressly or by implication all the material terms of the alleged agreement, which has been signed by the party to be charged, or by his agent lawfully authorized thereto: *Gwathney v. Cason*, 74 N. C. 5, 21 Am. Rep. 481, especially at page 10, where Rodman, J., states the rule; *Miller v. Irvine*, 18 N. C. 104; *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744; *Rice v. Carter*, 33 N. C. 298; *Neaves v. North State Min. Co.*, 90 N. C. 412, 47 Am. Rep. 529; *Mayer v. Adrian*, 77 N. C. 83. Many other cases could be cited from our reports in support of the rule, but those we have already mentioned will suffice to show what is the principle and how it has been applied. In commenting on the policy of the statute, so far as it affects the vendee, and answering a suggestion that the statute applies only to the vendor, who alone conveys the land or any interest therein, Ruffin, C. J., for the court, in *Simms v. Killian*, 34 N. C. 252, says: "The danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it, as that by similar means a feigned contract of sale should be established against the owner of the land. Hence the act in terms avoids entirely every contract, of which the sale of land is the subject, in respect of a party, that is, either party who does not charge himself by his signature ¹⁸⁷ to it after it has been reduced to writing." So, in a case where a stipulation that the vendee would open a street, which constituted a part of the price to be paid for the land, was not stated in the writing, it was held by this court that the vendor could not recover for a breach of the stipulation, because, being



a part of the price, it was also a part of the agreement, and was not evidenced by a writing which had been signed by the defendant: *Hall v. Fisher*, 126 N. C. 205; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698. The fact that the defendant in this case paid five dollars on the purchase money and took possession of the land does not change the result. The doctrine of part performance is not now recognized by this court.

The party to be charged upon a contract, within the meaning of the statute is the defendant in the action, or the party against whom it is sought to enforce the obligation of the contract. It is not the vendor, unless he occupies upon the record the position of the party who is called upon to perform his contract. "The object of the statute was to secure the defendant": *Pearson, J.*, in *Rice v. Carter*, 33 N. C. 298. See, also, *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744; *Love v. Welch*, 97 N. C. 200, 2 S. E. 242; *Green v. North Carolina R. Co.*, 77 N. C. 95; *Love v. Atkinson*, 131 N. C. 544, 42 S. E. 966. Anything said in *Taylor v. Russell*, 119 N. C. 30, 25 S. E. 710, in conflict with this view of the statute cannot, we think, be sustained. *Green v. North Carolina R. Co.*, 77 N. C. 95, which is cited in *Taylor v. Russell*, 119 N. C. 30, 42 S. E. 966, does not support the proposition that the vendee is not protected by the statute. In that case the plaintiff, who was the vendee, sued the defendant, who was the vendor, to recover the value of the wood which he agreed to give for the land at a stipulated price. The court held merely that as the plaintiff had sued on the contract and the defendant had waived that statute he was bound by its terms and must recover, if at all, not the ¹⁸⁸ value of the wood but the price agreed upon. He could not in such a case repudiate his contract, when defendant was willing to perform it. In support of this ruling, the court cited *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744, which case directly sustains the doctrine as we have stated it. The defendant, therefore, can avail himself of the statute as the party to be charged.

This court has held, it is true, that the consideration of the contract need not be stated: *Miller v. Irvine*, 18 N. C. 104; *Ashford v. Robinson*, 30 N. C. 114; *Thornburg v. Masten*, 88 N. C. 293; but in each of those cases the vendor was the defendant and the party to be charged.

There is quite a difference between the price to be paid by the vendee and the consideration necessary to support the contract and enforce it against the vendor. The latter can be shown by parol, as at common law, and the writing, as said by Ruffin, C. J., in *Miller v. Irvin*, 18 N. C. 103, need not contain any matters but such as charge him, the vendor, that is, such stipulations as are to be performed on his part. He is to convey and the writing must be sufficient to show that this duty rests upon him as one of the parties to the contract when he is sought to be charged. The vendee is to pay a certain price, and the writing must likewise show his obligation—its nature and extent—when the action is against him: *Clark on Contracts*, 2d ed., pp. 85-87; *Williams v. Morris*, 96 U. S. 444, 24 L. ed. 360. It must show the price, for, otherwise, the true contract of the vendee as to one of its essential terms would not be reduced to writing, and we could not see from the writing what it is so as to enforce it against him. If we permitted the vendor to supply this defect by parol proof, it would at once introduce all the mischiefs which the statute was intended to prevent: *Simms v. Killian*, 34 N. C. 252; *Williams v. Morris*, 96 U. S. 444, 24 L. ed. 360.

The receipt in this case does not show the price. How, then, can the court be informed as to what the price is, unless ¹⁸⁹ it admits parol testimony to prove the fact. To do so would be in direct violation of the statute—its letter and its spirit.

The judgment of nonsuit was properly granted in the court below.

No error.

Douglas, J., concurs in result only.

Under the Statute of Frauds only the party to be charged is required to sign the agreement: *McPherson v. Fargo*, 10 S. Dak. 111, 66 Am. St. Rep. 723. Thus, the signing of a contract for the sale of land by the vendor alone, if accepted by the vendee, cannot be avoided by the former: *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42, and see the cases cited in the cross-reference note thereto. And a memorandum signed by a vendor acknowledging the receipt of a deposit on account of the purchase price satisfies the statute, though not signed by the vendee: *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123. If the name of a party to be bound on a contract appears in the body of the memorandum, instead of being signed at the end, this is a sufficient subscription, if written by him or his agent: *New England Dressed Meat etc. Co. v. Standard Worsted Co.*, 165 Mass. 328, 52 Am. St. Rep. 516. The expression of the consideration

in the memorandum is discussed in the note to *Siemers v. Siemers*, 60 Am. St. Rep. 432-441. And the doctrine of part performance is discussed in the recent decisions of *Cooper v. Colson*, 66 N. J. Eq. 328, 105 Am. St. Rep. 660, and cases cited in the cross-reference note thereto.

GOODWIN v. CLAYTOR.

[137 N. C. 224, 49 S. E. 173.]

EXECUTION—Exemption Laws Have no Extraterritorial Effect.—Hence, in an action in North Carolina the exemption laws of Virginia cannot be relied on, though the plaintiff and the defendant are residents of that state. (p. 482.)

CORPORATION, Domicile of.—For the purpose of garnishing a debt due from it a corporation will be deemed to have its domicile in North Carolina, where its principal place of business and its property are in that state, except an office which it has in New Jersey, the state of its incorporation. (p. 483.)

CORPORATION, Situs of for the Purpose of Garnishment.—A debt may be garnished in the state of the debtor's domicile, though the plaintiff and the defendant in the action in which the writ was issued reside in another state. (p. 483.)

GARNISHMENT, Lien of, When not Lost by the Taking of Judgment Against the Defendant.—The lien acquired by the garnishment of a debt due the defendant is not lost by taking judgment against the defendant and the garnishee. (p. 483.)

GARNISHMENT of Moneys not Earned nor Due.—Under the code of North Carolina, a judgment against a garnishee may include moneys not earned nor due at the time he was summoned to answer, if they were due when he answered and when the judgment was rendered. (p. 484.)

GARNISHMENT, Limitation upon Creditors' Right of.—The plaintiff in garnishment is substituted merely to the interests of his own debtor, and cannot enforce any claim against the garnishee which the debtor himself, if suing, would not be entitled to enforce. (pp. 484, 485.)

GARNISHMENT—Foreign Corporation, When Subject to.—A foreign corporation doing business in North Carolina and complying with its laws respecting such corporations may be there garnished on account of salary due to one of its salesmen on whom process is served by publication, who is a resident of Virginia, and whose services were performed in that state under a contract entered into in North Carolina, such foreign corporation having been incorporated in New Jersey, but merely for the purpose of doing business in North Carolina. (pp. 485-487.)

EXECUTION.—Exemption Laws are Liberally Construed and so as to embrace all persons coming fairly within their scope. (p. 489.)

EXECUTION—Exemption Laws, Construction of.—Where an exemption is allowed in supplemental proceedings, it must be deemed to extend to garnishment and all other proceedings having for their object the taking of the property of the debtor and applying it to the satisfaction of his creditor. (p. 489.)

EXECUTION—Exemption.—The Earnings of a Debtor for His Personal Services at any time within sixty days preceding a garnishment are exempt therefrom. (p. 489.)

A. H. Eller, for the plaintiff.

Glenn, Manly & Hendren, for the defendants.

²²⁵ WALKER, J. This action was heard upon a case agreed as follows: The action was commenced before a justice of the peace by Goodwin, a resident of the state of Virginia, against Claytor, also a resident of the state of Virginia, for the recovery of one hundred and nine dollars and sixty-seven cents, with interest on ninety-six dollars and one cent from January 14, 1903, due ²²⁶ by judgment. The indebtedness of Claytor to Goodwin is admitted. Service of summons was duly had by publication and by garnishment of a debt due from the R. J. Reynolds Tobacco Company to Claytor. Claytor is an employé of the R. J. Reynolds Tobacco Company in the capacity of traveling salesman, and the money which was attached in the hands of the R. J. Reynolds Tobacco Company was the earnings of Claytor for his personal services, and said earnings accrued within sixty days next preceding the institution of this action, service of garnishment, filing of answer and the order of the justice. These earnings were used for the support of a family dependent upon him. It is admitted that the R. J. Reynolds Tobacco Company is a corporation duly chartered and created under and by virtue of the laws of the state of New Jersey and is engaged in the manufacture of tobacco, with its principal place of business and bulk of its property in Winston, North Carolina, it having no property in New Jersey, save that such office as is required by the laws of New Jersey is located there. The said company has complied with the laws of North Carolina in reference to foreign corporations of the nature and character of this company. The contract between Claytor and the company was signed by Claytor in Virginia and returned to Winston by mail. The preliminary arrangements, however, and the principal points involved in the contract were agreed upon at the office of the company in Winston. The salary of Claytor is usually paid him by check upon a bank in New York, which is sent to him by mail in Virginia, but occasionally a check is

drawn on a bank in Winston and mailed to him in Virginia. These checks are sent from the office of the company in Winston. The contract between the company and Claytor does not fix where or how his salary shall be paid. All services performed and done, under and by virtue of this contract, are performed and done in the states of Virginia and West Virginia, and no part of said ²²⁷ work is done in North Carolina. At the date of the service of the writ of garnishment on the company, it was indebted to Claytor by reason of the contract in the sum of sixteen dollars and fifty-five cents for salary and seventeen dollars and fifty-eight cents expense money, and likewise since the service of the writ of garnishment has become indebted to Claytor up to the date of filing the answer in the sum of eighty-six dollars for salary and blank dollars for expense money, the expense money being advanced by Claytor and the company reimbursing him for the same upon receiving statement thereof.

The laws of Virginia upon the question of exemptions are as follows: "Section 3630 of the Code of 1887—Every householder residing in this state shall be entitled to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for any debt or liability on contract, his personal and real estate, or either, to be selected by him, including money and debts due him, to the value of not exceeding two thousand dollars. Section 3652—Wages owing to a laboring man being a householder, not exceeding fifty dollars per month, shall also be exempt from distress, liability or garnishment. Section 3656—An injunction may be awarded to enjoin the sale of any property exempt under the provisions of this property, and to prevent the wages exempted by section 3652 from being garnisheed or otherwise collected by an execution creditor." It is admitted that Claytor is a householder, or head of a family within the meaning of the exemption law of the state of Virginia, and it is likewise admitted that he has never had allotted to him any exemption under and by virtue of the laws of that state. This agreed statement of facts is made and signed without prejudice to any rights of either of the interested parties to make any motion or enter any special appearance as in its or his judgment may be deemed advisable.

The court, upon the case agreed, rendered judgment in ²²⁸ favor of the plaintiff and against both defendant and garnishee for the full amount of his debt and the costs. Defendant and the garnishee excepted and appealed.

The counsel of the defendant and of the garnishee, in their able and exhaustive brief, rely on several grounds to defeat the plaintiff's recovery. For convenience, we will change somewhat the order in which they are stated in the brief. It is contended: 1. That the debt garnisheed is exempt by the laws of Virginia from garnishment; 2. That if the debt was subject to garnishment at all, any lien acquired by the service of the writ was waived and the garnishee released by taking a general and personal judgment against the defendant and the garnishee instead of taking an order condemning the debt to the payment of the plaintiff's claim; 3. That the judgment is erroneous, as it condemned a debt due after the service of the writ; 4. That the court was without jurisdiction to proceed against the garnishee for the purpose of condemning the debt due by him, because it is necessary to the possession and rightful exercise of such jurisdiction that three things should occur: (a) The corporation who is the garnishee in this case must have such a residence and agency within the state as renders it amenable to the process of the court; (b) the principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this state for the recovery of the debt; (c) it must appear that the situs of the debt is in this state; (5) and lastly, they insist that the earnings of a debtor are exempted from condemnation by the laws of this state. We will consider these contentions in the order thus presented.

The right of exemption under the laws of Virginia cannot ²²⁹ be enforced here. It is well settled that exemption laws have no extraterritorial effect. They are not, in respect to the question now under discussion, a part of the contract, but relate only to the remedy, and the right to an exemption is therefore subject to the law of the forum: *Rood on Garnishment*, sec. 100; *Chicago etc. Ry. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. Rep. 797, 43 L. ed. 1144; *Sexton v. Phoenix Ins. Co.*, 132 N. C. 3, 43 S. E. 749. But there is another decisive answer to this claim of exemption. We have concluded, as will appear hereafter, that the domi-

cile of the corporation, the Reynolds Tobacco Company, is for the purposes of this case in this state, and it nowhere appears that it has any domicile or even an agency in the state of Virginia. Indeed the case shows that, while it was created a corporation in the state of New Jersey, it has no property in that state, but the bulk of its property and its principal place of business are here. For this reason it could not be sued by the defendant Claytor in the state of Virginia for the debt garnisheed in this action, and Claytor therefore could not avail himself of the exemption laws of that state. It is argued that as the plaintiff and the defendant Claytor are residents of Virginia, if Claytor is not allowed his exemption under the laws of that state, the plaintiff will be enabled thereby to evade or "shove by" the law of the domicile of both of them and set it at defiance. How can this be if the plaintiff cannot, by the process of the courts of that state, reach and lay hold of the res which is the debt due by the tobacco company? An exemption it would seem can be allowed only in property actually situated in the state where the claim of exemption is asserted and where the property in which it is claimed is subject to the jurisdiction and process of its courts. As we will presently show, the tobacco company had no domicile and could not be served with process there, and, besides, as will also appear hereafter, the situs of the debt, if any is required, was here. The argument predicated ²³⁰ upon the exemption of the particular debt in Virginia must therefore fail, as no exemption exists.

We do not think that, if the plaintiff acquired any lien on the debt due to the defendant by the tobacco company, he lost it by taking a judgment against the defendant and the garnishee. The judgment against the garnishee seems to be expressly warranted and contemplated by the statute (Code, sec. 364), and that against the defendant is void as a personal judgment, as the court could acquire no jurisdiction to proceed against him except in so far as it could by its process levy upon or seize his property, and in this respect the suit is to all intents and purposes in the nature of a proceeding in rem and not of one in personam: *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Winfrey v. Bagley*, 102 N. C. 515; *Fisher v. Traders' Mut. Life Ins.*

Co., 136 N. C. 217, 48 S. E. 667; Insurance Co. v. Stratley, 172 U. S. 602. Nor do we think the judgment was erroneous in that it included a part of the debt which was not earned and due at the time the garnishee was summoned to answer, if it was due when he actually answered and the judgment was rendered. The Code, section 364, provides: "When an attachment shall be served on any garnishee in manner aforesaid, it shall be lawful upon his appearance and examination to enter up judgment and award execution for the plaintiff against such garnishee for all sums of money due to the defendant from him, and for effects and estates of any kind belonging to the defendant, in his possession or custody, for the use of the plaintiff, or so much thereof as shall be sufficient to satisfy the debt and costs and all charges incident to levying the same; and all goods and effects whatsoever in the hands of the garnishee belonging to the defendant shall be liable to satisfy the plaintiff's judgment, and shall be delivered to the sheriff or other officer serving the attachment." The language thus employed clearly indicates the intention that any money due by the garnishee, ²³¹ or goods in his hands belonging to the debtor at the time of appearance and answer, shall be applied in satisfaction of the debt: 1 Am. & Eng. Ency. of Law, 1st ed., pp. 1150, 1151, 1165. It does not appear in this case how or when the salary was to be paid. It is admitted, however, that an amount more than sufficient to pay the plaintiff's claim was due at the time of filing the answer, and judgment was rendered only for the amount of the defendant's indebtedness to the plaintiff.

We come now to the consideration of the defendant's fourth exception, which involves important questions not at all free from difficulty. For the purpose of determining whether any one of the defendant's contentions under the fourth exception is well founded, we may admit the general rule that a garnishment is in effect a suit by the principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the garnishee to recover the debt due to the plaintiff's debtor and apply it to the satisfaction of the plaintiff's demand. It would appear to be a necessary corollary from the proposition, thus stated, that the plaintiff in the garnishment is

in his relation to the garnishee substituted merely to the rights of his own debtor and can enforce no claim against the garnishee which the debtor himself, if suing, would not be entitled to recover: Shinn on Attachment, sec. 487; Myer v. London etc. Ins. Co., 40 Md. 595; Brauser v. New England Fire Ins. Co., 21 Wis. 509. The garnishee can be placed in no worse position by reason of the garnishment than he occupied as a debtor to the defendant, nor subjected to any greater liability. This is a just and reasonable doctrine, but it does not by any means sustain the objections of the defendant. It seems to be conceded that if the creditor of the garnishee can sue the latter in this state, then the plaintiff can proceed here against the garnishee. That the garnishee, the tobacco company, although a corporation having its domicile of origin in New Jersey, was amenable to process such as issued in this case is too well settled to be now ²³² an open question. We are speaking now of the service of process and not of jurisdiction. It is found as a fact that the company has complied with the laws of this state concerning foreign corporations, which means either that it had an agent in this state upon whom process could be served under the general law in all actions against it, or that it had complied with the provision of chapter 5 of the Acts of 1901. As the tobacco company transacted business here by the favor or comity of this state, it was subject to the state's laws and to all of its reasonable rules and regulations regarding the service of process, and any judgment of a state court, having jurisdiction of the cause or of the subject of the action, is binding upon the company, at least in this state, the same as if it were a domestic corporation or an individual. The subject is fully discussed in Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667, decided at this term. See, also, St. Louis etc. Ry. Co. v. James, 161 U. S. 545, 16 Sup. Ct. Rep. 624; Louisville etc. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. Rep. 875; Shields v. Union Cent. Life Ins. Co., 119 N. C. 380, 25 S. E. 951. While the company cannot be treated as a domestic corporation or as a distinct entity in this state, for the purpose of determining the jurisdiction of the federal courts, it may be so regarded in respect to its liability to be sued here and the jurisdiction of our courts over it,

which extends to suits not only by residents of this state, but to those by residents of other states, who are equally entitled to be admitted to our courts to prosecute actions for the protection of their rights and the recovery of their property, in the absence of any law forbidding the same. The state may, it is true, exclude nonresidents from our courts, if it sees fit to do so, without infringing the constitution of the United States, which protects only citizens of a state against such discrimination by another state; but we do not think the principal defendant, who is the debtor of the plaintiff, has been denied the right to sue his debtor, the garnishee, in our courts by section 194 of the Code. It having been settled that a ²³³ foreign corporation exercising its franchises in this state may be subjected to the process of garnishment, when it holds property or credits of the debtor for which the latter can sue in our courts, and that the plaintiff in attachment as against the garnishee is subrogated to the rights, in that respect, of the debtor, and can recover only by the same right and to the same extent as the debtor could recover, if he were suing the garnishee, his debtor (*Myer v. London etc. Ins. Co.*, 40 Md. 595), it must follow that the plaintiff may maintain his action and the garnishment proceedings as ancillary to it, unless he is precluded from doing so by section 194. That section provides that an action may be brought against a foreign corporation by a plaintiff not a resident of this state, when the cause of action shall have arisen or the subject of the action shall be situated within this state. It appears in this case that the terms of the contract between Claytor and the tobacco company were agreed upon in this state, and, while the services were performed by Claytor in Virginia, all checks for his salary or wages were drawn at and sent from Winston in this state; and it further appears that the tobacco company has no property in New Jersey, which by courtesy may be called its domicile of origin, and that the bulk of its property is in this state, which is actually its domicile by adoption. What a curious result would follow if we should hold that Claytor cannot sue the company in this state. We will force him to seek his debtor in New Jersey, but he will find no property there to satisfy his debt, and there is no good reason why he should be required to resort to the

courts of any other state than New Jersey where there may happen to be some of the property of his debtor, but where the debtor has no domicile of any kind, and where the same law may exist as we have here; nor should he be required to first obtain judgment in New Jersey and then come here to sue upon it. A construction of our statute, with reference to the special facts of this ²³⁴ case, which would produce such an anomaly by requiring him to pursue any one of the courses indicated, should not be accepted as the true one, unless no other is admissible. The transactions out of which the cause of action of Claytor against the company arose occurred in this state and the debt due to him was as much payable here as it was in Virginia. For some purposes it may be important to determine precisely where a debt is payable or a contract is to be performed, but it is a well-established general rule that "all debts are payable everywhere, unless there be some special limitation or provision in respect to the payment, the rule being that debts as such have no locus or situs, but accompany the creditor everywhere and authorize a demand upon the debtor everywhere": 2 Parsons on Contracts, 8th ed., 702. The contract between Claytor and the tobacco company contained no "special limitation or provision in respect to payment," and the debt growing out of it if not, by reason of the special circumstances of its creation, payable here (*Perry v. Erie Transfer Co.*, 19 N. Y. Supp. 239), was payable generally, and could have been sued on by Claytor in this state and therefore was attachable here. "This is the principle and effect of the best considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose": *Chicago etc. Ry. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. Rep. 797, 43 L. ed. 1144; Beale on Foreign Corporations, sec. 284. Considering the special facts of this case, we find that the tobacco company obtained a charter in New Jersey for the avowed purpose of establishing its principal office and transacting its business in this state. It was born, it is true, in New Jersey, but it lives, moves and has its being in this state. It is nominally a corporation of the other state where it was originally created, but in reality has its home, its domicile, here. There is no valid or practical reason why this

case should not be held to come substantially within the principle of *Sexton v. Phoenix Ins. Co.*, 132 N. C. 3, 43 S. E. 749, and ²³⁵ *Boyd v. Royal Ins. Co.*, 111 N. C. 372, 16 S. E. 389, and if that is the correct view the tobacco company cannot certainly be prejudiced in the least when it is required to pay its debts where it conducts its business and has all or the larger part of its assets. On the contrary, it will be to its advantage if it is required to pay where it has its assets rather than at the domicile of its origin where it has none, and where it performs none of its corporate functions. This case is clearly distinguishable from *Balk v. Harris*, 124 N. C. 468, 70 Am. St. Rep. 606, 32 S. E. 799, 45 L. R. A. 257, and *Strause v. Aetna Fire Ins. Co.*, 126 N. C. 223, 35 S. E. 471, 48 L. R. A. 452. The facts of this case and of those two cases are wholly different. It has been said that a corporation must dwell in the place of its creation and cannot migrate to another sovereignty (*Bank of Augusta v. Earle*, 13 Pet. 588, 10 L. ed. 308), but this dictum has been held to be nothing but a rhetorical statement of the perfectly obvious principle that a corporation, wherever it goes, is subject to the law of the state where it was created, and cannot rid itself of the control of that state, nor can it disregard the restrictions of its charter which embodies the limitations of its legal existence and its corporate powers. It may, though, acquire a domicile or a residence in another state, and be subject to its laws to the same extent as if it had been fully domesticated there: *Murfree on Foreign Corporations*, secs. 8, 9. Our conclusion on this branch of the case is that the tobacco company was amenable to the process of our courts, both mesne and final; that the cause of action against it and in favor of Claytor arose in this state (*Steel v. Rutherford Co. Commrs.*, 70 N. C. 137), and that the subject of the action is situated here, that is, the debt due from the tobacco company to the defendant, the *res* as it is called (*Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198), which has been brought within the jurisdiction of the court by service of the garnishment.

It was necessary to decide the question we have discussed before considering the defendant's last ground of objection, ²³⁶ because a decision for him on any one of those questions would have settled the case entirely in his favor.

The defendant further insists that his earnings for personal services at any time within sixty days next preceding the garnishment were exempt under section 493 of the code. He admits that this exemption is allowed by that section in supplementary proceedings, but his counsel argue that it is intended by the law that such earnings shall in no way be condemned or applied to the payment of debts. The humane and beneficent provisions of the law in regard to exemptions, being remedial in their nature and founded upon a sound public policy, should always receive a liberal construction so as to embrace all persons coming fairly within their scope: Black's Interpretation of Law, 311. This court has uniformly held that where property is exempted from seizure under final process it is similarly exempt from levy or seizure under any mesne process, issued for the purpose of placing it in the custody of the court and thus preserving it until it can finally be applied to the satisfaction of the plaintiff's debt: *Chemical Co. v. Sloan*, 136 N. C. 122, 48 S. E. 577. Supplementary proceedings are in the nature of final process, when viewed either as a substitute for a creditor's bill to enforce the payment of a judgment at law or as a proceeding having the essential qualities of an equitable *fi. fa.*, and if the defendant comes within the general description of the persons designated in the act, there is no good reason for denying him the exemption under the garnishment. The homestead and personal property exemptions can be claimed only by residents of this state. But this is so by reason of the express words of our constitution and laws. There is no such limitation in section 493, and we are unable to see why we should restrict its meaning so as to exclude the defendant from the benefit of its wise provisions, and thereby defeat the evident policy and benevolent purpose of the legislature. We prefer to give the section a liberal ²³⁷ construction which will be apt to do justice and at the same time carry out the legislative intent, and which, too, will not be contrary to the letter of the law.

The defendant should be allowed his exemption out of his earnings in accordance with the provisions of section 493, and to this extent there was error in the judgment upon the case agreed.

We have discussed the case somewhat at length, as it involves questions of great and increasing importance and, it may be, of far-reaching consequences. It was unusually well presented on both sides by counsel in their briefs.

Error.

Exemption Laws have no extraterritorial effect; the exemption laws of one state cannot avail a debtor in a suit instituted against him in another state: *Carson v. Railway Co.*, 88 Tenn. 646, 17 Am. St. Rep. 921; *East Tenn. R. R. Co. v. Kennedy*, 83 Ala. 462, 3 Am. St. Rep. 755. Wages earned in another state, by the laws of which they are exempt from execution, may nevertheless be subject to garnishment in this state: *Lyon v. Callopy*, 87 Iowa, 567, 43 Am. St. Rep. 396. See, however, *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 42 Am. St. Rep. 613; *Illinois etc. R. R. Co. v. Smith*, 70 Miss. 344, 35 Am. St. Rep. 651; *Drake v. Lake Shore etc. Ry. Co.*, 69 Mich. 168, 13 Am. St. Rep. 382. And when the wages of a nonresident debtor earned and payable in another state are sought to be subjected to garnishment in Illinois, the exemption law of that state, and not that of the debtor's domicile, will control: *Wabash R. R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74. See, also, *Harwell v. Sharp*, 85 Ga. 124, 21 Am. St. Rep. 149.

SUFFOLK AND CAROLINA RAILWAY COMPANY v. WEST END LAND AND IMPROVEMENT COM- PANY.

[137 N. C. 330, 49 S. E. 350.]

EMINENT DOMAIN—Evidence Tending to Show Value of Land Taken.—Evidence that there is an improved street near the land sought to be condemned on which residences of good size and quality have been erected is properly received, because it tends to show the value of the lands which are the subject of the proceeding. (p. 492.)

EVIDENCE, Tax List as.—A tax list is not admissible for the purpose of showing the value of the property sought to be taken in proceedings in the exercise of the right of eminent domain. (p. 492.)

EMINENT DOMAIN—Damages for Property Already Dedicated as a Public Street.—In proceedings to acquire as a right of way for a railroad the whole of a public street, the defendants, who are abutting owners, having already dedicated it as such, are entitled to the full value of the land taken without any deduction being made on account of such previous dedication. (pp. 494, 495.)

Pruden & Pruden and E. F. Aydlett, for the plaintiff.

Ward & Thompson, for the defendant.

330 DOUGLAS, J. This is a special proceeding to condemn a right of way for railroad purposes through certain

lands owned by the defendant. It appears that the defendant bought about one hundred and thirty acres of land adjoining the corporate limits of Elizabeth City, which is laid off into lots and streets. Some of the streets were improved, while others were not. Among the unimproved streets was Grice street, which was condemned as an entirety as a right of way for the use of the plaintiff, and has been taken for such use. The report of the commissioners does not state the length or width of the right of way, but describes it simply as "all that certain strip of land across the lands of the defendant company and known and described as Grice street." The evidence and the plat show that said street is fifty feet wide, including sidewalks—that is, between the building lines. The sole issue was the amount of damages that the defendant was entitled to recover, which were assessed by the jury at two thousand three hundred dollars. There was testimony on both sides. The plaintiff appealed from the judgment rendered.

³³¹ The principles involved in this case are few and well settled. Its determination really depends more upon the weight given to the testimony, and that has been settled by the verdict of the jury. The first exception is to the admission of the following testimony given by a witness for the defendant: "There is a street two blocks away parallel to the one down which the railroad runs, which has been improved at considerable expense, having been paved with brick, and on this street several residences of good size and quality have been erected. The said improved street and the street covered by the right of way of the railroad are parts of the same tract of land, belonged to the defendant company, and are near each other. The said improvements placed upon the property in question increase the value of the whole tract. Cross-streets connected the improved street with Grice street."

The record states that it was given on cross-examination. This is denied by the plaintiff. We must assume the truth of the record, but it makes no difference, as we think the evidence was competent in either event. It does not come within the prohibition of the rule affirmed in *Rice v. Norfolk etc. Ry. Co.*, 130 N. C. 375, 41 S. E. 1031, following *Warren v. Makely*, 85 N. C. 12, and that class of cases. It does not seek to prove the ³³² value of one piece of land by comparison with the value of another, but to show its value by its location and surroundings. It is common knowledge that

suburban property will sell better if it is in a good neighborhood, near to a macadamized road and in the immediate vicinity of churches and schools. If this property is within two squares of a paved street and close to good houses it would necessarily sell for more than if it were far from any house, with a mile of mud-holes between it and the town. This seems to us less a question of law than of the natural and necessary effect of the evidence. The witness had testified on his direct examination that the lots on Grice street were worth one hundred and fifty dollars on an average; that the damage would average at least fifty per cent and would amount, in his opinion, to five thousand six hundred and twenty-six dollars, being an average of seventy-five dollars per lot. On cross-examination he was testifying to facts which tended to show the reasonableness of the opinion he had expressed. We do not find any exception to this evidence in the record, but as both sides argued it under the assumption that there was an exception, we have considered it in that view. We see no error in its admission.

The second exception is to the exclusion of the tax list which was offered by the plaintiff to show the value of the land in question. It was properly excluded as being clearly incompetent for the purpose for which it was expressly offered. There are cases in which the tax lists have been admitted as some evidence, though slight, of claim of title and of the character of possession by the party listing the same: *Austin v. King*, 97 N. C. 339, 2 S. E. 678; *Pasley v. Richardson*, 119 N. C. 449, 26 S. E. 32; *Bernhardt v. Brown*, 122 N. C. 587, 65 Am. St. Rep. 725, 29 S. E. 884; *Gates v. Max*, 125 N. C. 139, 34 S. E. 266. Where the mere listing of the land is the act sought to be shown, the tax lists are admissible, because the lister is the actor; but the rule is essentially different where the value of the land is sought to be proved thereby, because the valuation is ³³³ the act of the assessors and therefore *res inter alios acta* as between the parties to this proceeding. As was said by the court, through Pearson, C. J., in *Cardwell v. Mebane*, 68 N. C. 485: "The 'tax lists' were not competent evidence to show the value of the land, as the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the jury." In that case the tax lists were admitted for the purpose of proving the good faith of the vendees, who were charged with paying their father an exorbitant or fictitious price for the

land, but not for the purpose of showing its actual value. In *Ridley v. Seaboard etc. R. R. Co.*, 124 N. C. 37, 32 S. E. 325, this court, speaking through Clark, J., says: "Acquiescence in listing and payment of taxes by another is evidence against the party out of possession. But the tax valuation being placed on the land by the tax assessors, without the intervention of the land owner, no inference that it is a correct valuation can be drawn from his failure to except that the valuation is too low. Such valuation was *res inter alios acta*, and is not competent against the plaintiff."

The third and last exception is to the following part of his honor's charge, to wit: "The jury would estimate the damages, if any, arising from the impaired value of defendant's land caused by condemnation of plaintiff's right of way; would deduct therefrom any advantages and benefits arising from the construction of plaintiff's railroad which were peculiar to this land, but not such benefits and advantages as were common to this and the public generally; and on applying this rule the excess, if any, of the damages over the benefits and advantages would be the amount to award defendant in response to this issue."

It is needless to discuss this question, in view of the recent and well-considered case of *Railroad v. Platt Lands*, 133 N. C. 266, 45 S. E. 555, in which the rule laid down in the charge ³³⁴ is expressly approved. In fact, the plaintiff does not seem to question it as a general proposition of law, but in its brief explains the nature of its objection in the following words: "The objection to the charge of the court is that the court left it with the jury to estimate full damages for the right of way of plaintiff. We think this is error. The street had been appropriated for the public. The property had been laid off in lots and the streets were necessary for the use of the lots. They are marked on the plat and the property is being offered for sale in lots, so that the defendant owning this property would be entitled to damages by reason of the additional burden placed upon Grice street, and not for the full damage for the right of way. Grice street, as shown by the plat, is donated for the use of the public, being laid off in lots, and the defendants cannot withdraw the right to the street, and do not claim or desire to do so; therefore they are not entitled to the street which they have donated for the use of these lots and means to sell them, and they can only recover by reason of the ownership of the adjoining

lots such additional burden as the right of way for the plaintiff shall place upon said Grice street. It is admitted by both plaintiff and defendants that where the railroad right of way goes is Grice street." The plaintiff relies upon *White v. Northwestern etc. Ry. Co.*, 113 N. C. 610, 37 Am. St. Rep. 639, 18 S. E. 330, 22 L. R. A. 627, and *Hodges v. Western Union Tel. Co.*, 133 N. C. 225, 45 S. E. 572, in support of its contention that the defendant can recover only for the additional burden of the railroad right of way. To the same effect is *Phillips v. Postal C. Tel. Co.*, 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022. We presume that the principle itself is not questioned by either party to this proceeding, however they may differ as to its application.

In the case at bar the plaintiff does not in practical effect impose an additional burden upon the street, but takes the street itself from building line to building line, thus rendering ³³⁵ it useless as a highway and destroying the essential purpose of its dedication. It is stated in the evidence that the plaintiff is digging up the entire street, and that the track is above the level of the surrounding land. This will virtually compel the owners to cut off from the abutting lots enough land to make a street on each side of the right of way, which would not leave sufficient depth for suburban lots in the absence of public sewerage. Moreover, under these circumstances the street would be practically impassable from side to side, and could never be made a handsome or convenient thoroughfare. It is well settled that the defendant is entitled to recover not only the value of the land taken, but also the damage thereby caused to the remainder of the land. Even if the plaintiff should not use the entire right of way, the rule would be the same, as it is not what the plaintiff actually does, but what it acquires the right to do, that determines the quantum of damages. If the plaintiff acquires the right to use the entire street, that land is, in contemplation of law, just as much taken for the purposes of the easement as if it were filled with railroad tracks. Of course this rule does not apply to subsequent acts of tort not contemplated in the original condemnation. This distinction is clearly pointed out in *Raleigh etc. R. R. Co. v. Wicker*, 74 N. C. 220, and the rule therein laid down has been uniformly followed by this court: *Brown v. Carolina Cent. Ry. Co.*, 83 N. C. 128; *Knight v. Albermarle etc. R. R. Co.*, 111 N. C.

80, 15 S. E. 929; Mullen v. Lake Drummond Canal Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833. We are somewhat struck with the action of the original commissioners, who assessed the defendant's net damages at one hundred dollars, stating in explanation that they had estimated and deducted "the increased value peculiar to part of said abutting land that the said railroad would bring." What this increased value would be, or how it would be brought about, they do not state. The only evidence we find of any such probable increase ³³⁶ in value is the statement made by both the plaintiff's witnesses that the railroad "opened up the property for factories and increased the value of the same more than the damages sustained." To destroy property for the purpose for which the owners alone intend it, and turn it into factory sites when there are no factories in sight, is a benefit entirely too remote and contingent to be capable of present estimation. Some of us may have heard of factory sites before, and as we listened to the siren voice of the real estate agent, have seen lofty factories rise in the air, pouring forth their countless thousands of well-paid operatives seeking to buy a few choice lots in the neighborhood of Eden. Perhaps we have revisited in after years the scene of once bright but faded anticipations, only to find a lonely cow grazing in the middle of Broadway or a solitary pig-pen standing as a monument to buried hopes. It is due to the plaintiff's counsel to say that they did not press this contention in this court, either in brief or argument.

There is another matter which, while not under exception, we think deserves attention. The commissioners, in their report condemning the land, describe it as follows: "Did proceed to condemn, and by these presents do condemn all that certain strip of land across the lands of the defendant company and known and described as 'Grice street,' for a right of way to be used by the plaintiff company for the purposes set out in said petition." It is true the said right of way was fully and correctly described in the plaintiff's petition, which referred to a plat properly filed; but it seems to us that, as the easement is conveyed to the petitioner by the report of the commissioners when confirmed, the said easement should be therein described as fully and correctly as it would be in a grant. Indeed, it might be better if the extent of the easement were also set out in the judgment of ³³⁷ the court, al-

though in the present case his honor's judgment could not have been other than it was, as the case was presented to him.

The judgment of the court below is affirmed.

Ordinarily When Land is Condemned as a right of way for a railroad, though nothing but the easement is acquired, the damages are practically the same as if the fee were taken; and when such is the case, the law requires the condemning corporation to pay the value of the fee as the measure of damages: *Southern Pac. R. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 106 Am. St. Rep. 36.

MILLSAPS v. ESTES.

[137 N. C. 535, 50 S. E. 777.]

AN INFANT'S SUBMISSION TO ARBITRATION is Voidable Merely and not void. (pp. 498, 501.)

A SUBMISSION TO ARBITRATION is an Agreement by Which the Parties Refer disputed or doubtful matters pending between them to the final decision and award of another party. (p. 499.)

AN INFANT cannot Submit to an Award Which Will Give an Irrevocable Title. (p. 501.)

INFANTS—Award.—A Guardian or Next Friend has no power to submit to an award for an infant which would give an irrevocable title. (p. 501.)

A JUDGMENT by Consent Against Infants based on submission to arbitration by their guardian ad litem or next friend is a subject of attack as to the submission itself and the award based thereon. (p. 503.)

JUDICIAL SALE—Innocent Purchasers, When not Protected by.—Where the irregularity and defects are apparent on the face of the record, persons purchasing the property subject thereto must be deemed to have had notice of such defects. (pp. 503, 504.)

INFANTS, Judgment Against, When not Binding on.—Where a suit purports to be commenced by infants to have a life estate forfeited for waste and for the cancellation of a certain conveyance, and the counsel of record submits to an arbitration only requiring the arbitrators to report the value of the land and the amount which had been paid their father therefor, and that judgment shall be rendered for the difference between the amount so paid and the value of the land, such judgment when entered is voidable at the instance of the infants. (p. 504.)

INFANTS in Seeking to be Relieved from a Judgment Against Them Must do Equity and restore whatever they have received under it. (p. 504.)

A. M. Fry, for the petitioners.

Shepherd & Shepherd, in opposition.

⁵³⁶ WALKER, J. This case was before us at spring term, 1904, when we ordered a new trial. It is reported in 134 N. C. 486, where the facts are fully stated by Justice Montgomery. We are now asked to rehear the case, and to review and reverse the decision we then made. A brief recital of the leading facts will make plain our reason for not doing so. The plaintiffs brought a suit in 1888 against Estes and others, and alleged in their complaint that their grandfather, John A. Millsaps, had devised to their father, W. R. Millsaps, the land in controversy for and during his natural life, with a restriction annexed to the gift that he should not sell and convey the same, and at his death to his legitimate children, the plaintiffs, and that their father sold and conveyed the land to the defendants in this suit, who entered while the life estate was still subsisting, and committed waste upon the land. Their prayer was for a forfeiture of the life estate and for damages for the waste committed and for a cancellation of the deeds made by the life tenant. The material allegations were denied by the defendants. Plaintiffs were all infants at the time the suit was commenced, and when the judgment therein was rendered, and there was no appointment ⁵³⁷ of a next friend, upon written application and order, as required by the rule of the court, to prosecute the suit in their behalf—Clark's Code, third edition, page 958—though the name of John Shuler was inserted in the summons by the clerk as such next friend. The evidence does not tend to show that he took any interest in the subsequent proceedings or any care of the interests of the infants. So far as appears, the latter had no actual knowledge of the institution of the action or of the proceedings therein. The evidence tends to show that the action was commenced at the instance of their father, whose conduct and relation to the cause indicates that he was unfriendly to their interests, and was attempting by the suit to cure the defective title he had conveyed to the defendants. The counsel of record consented to an arbitration, the submission requiring the arbitrators not to ascertain and determine what were the real rights of the plaintiffs, but simply to report the value of the land and how much had been paid to William Millsaps by those who purchased from him. It was further provided that the judgment should be entered for the difference between the value of the land and the sums so paid, or "for the balance thus found due to the plaintiffs." The arbitrators reported the

value to be fifteen hundred and fifty dollars, the amount paid eleven hundred and ninety-four dollars and sixty cents, leaving a balance due of three hundred and fifty-five dollars and forty cents to be paid as follows: G. D. Estes, two hundred and twenty-five dollars; W. R. Randall, forty-five dollars and forty cents, and John Long, fifty-five dollars. The other purchasers, J. A. and Mary M. Franks, were found to have paid their share in full, and no sum was reported as due by them. In accordance with the submission by consent of counsel, it was afterward adjudged by the court that the award be approved and made a rule of court, and that the defendants respectively pay to the plaintiffs the several amounts thus found due by the report of the arbitrators, and the clerk, as commissioner, was appointed to make title to the purchasers upon payment of the sums so due. The several amounts were afterward paid and title ⁵³⁸ made by the commissioner accordingly. It further appears in the case that of the balance reported as due, namely, three hundred and fifty-five dollars and forty cents, the infants, by their guardian, received in round numbers one-half thereof, so that they have realized from their land, which is worth fifteen hundred and fifty dollars, the small sum of one hundred and seventy-five dollars.

This action is brought to set aside that judgment and the award for the reasons stated in the former opinion, some of which were, that the attorneys had no power or authority to consent to any such arbitration, and the court had no power to enter a judgment by consent thereon, and further that an arbitration by infants or their next friend or attorneys, if properly appointed, is voidable if not void. At the former hearing this court held that the arbitration and proceedings based thereon were void and could not be set up as an estoppel or as *res judicata* so as to conclude the infants. Counsel for the petitioners now argue that this was error, as the submission, the arbitration and the award at most were only voidable, and that the infants cannot avail themselves of the defect and disown the act of the attorneys and disaffirm the award, because a judgment of the court has supervened, and as some at least of the defendants purchased for value upon the faith of that judgment, without notice of any illegality, they are protected under the general principle applicable to persons who buy at judicial sales and who are strangers to the suit in which the sale was ordered.

We find that the authorities are not agreed as to whether an infant's submission to arbitration is void or merely voidable. Some courts, which are entitled to the greatest respect, have held that it is utterly void, while others of equal authority have held that it is only voidable. In this conflict of opinion, we are inclined to concur with those courts and the text-writers who maintain the proposition that such submissions are voidable merely, as we are unable to see why the case should be taken out of the general rule as to the contracts ⁵³⁹ of infants, a submission being in itself a contract or so far partaking of its nature as to be substantially within the principle applicable to contracts. A submission to arbitration may be defined as the agreement by which parties refer disputed or doubtful matters pending between them to the final decision and award of another party, whether one person or more; the party to whom the reference is made is called an arbitrator; the arbitration is the investigation and determination of the matters of difference between the contending parties by the arbitrator so chosen, and the award is the decree or judgment of the arbitrator and is generally conclusive in its effect: 2 Am. & Eng. Ency. of Law, 2d ed., 539; Morse on Arbitration, 36. The basis of the arbitration and award is the submission. Watson, in his book on Arbitration, 59 Law Lib. (1848), page 55, thus states the law upon the question now presented: "Every person capable of making a disposition, or a release of his right, may make a submission of that right to arbitration, and consequently will be bound by an award made in pursuance thereof. But persons who cannot bind themselves by contract cannot submit to arbitration, as infants, *femes covert*, persons compelled by threats and imprisonment, persons professed in religion. It is quite clear that a submission by an infant is either void or voidable; and unless he ratifies when he attains his age, he is not bound by his submission to perform an award. In Rolle's Abridgment it is laid down generally that an infant is not bound by his submission of a trespass committed either on his person or on his land. In another place, in the same book, it is said that such submission is only voidable. And this seems to be the only doubtful question respecting the submission, as far as regards the infant himself; for in some cases it has been held that a submission by an infant is merely void; in others that it is only voidable. In a modern case, where a cause was referred by parol agreement, in ⁵⁴⁰ which an infant (by his

prochein ami) was plaintiff, it was held to be quite clear that the infant was not bound by the award, but the court directed that he should have notice of the award, and if he would not perform it, that the defendants should be at liberty to carry down the record to trial, by proviso," trial by proviso being one brought on by the defendant on notice to the plaintiff and taking its name from the words of the writ to the sheriff which required him to execute only one of the writs (or notices) of trial: 3 Black. 357. So that it appears the arbitration was altogether ignored and the defendant was left at liberty to proceed as if plaintiff had failed to bring down the record to the assizes. He also refers to a case in which the court of king's bench (by Abbott, C. J.), reversing the court of common pleas, held that where infant plaintiffs appeared by next friend, their attorney or solicitor had no authority to consent for them or their next friend to a submission, and consequently that they were not bound by the award: Biddell v. Dowse, 13 Eng. Com. L. (6 Barn. & C.) 164. In Cavendish v. Wood, 1 Ch. Cas. 279, or 22 Eng. Rep. (reprint), 800, Lord Chancellor Nottingham refused to decree the performance of an award against an infant, who appeared by his guardian, which was based upon a submission by consent and order of the court, because it was inequitable on its face, and he added that, "He would never decree an award which should bind an infant": Evans v. Cogan, 2 P. Wms. 450. Morse thus refers to the subject: "The agreement of an infant to submit to arbitration is like any other contract into which he might enter. There is an old English case in which his undertaking is declared absolutely void. But the later and conclusive authorities hold it to be only voidable. The presumed incompetency of an infant to have a proper care for his own interest will be kept by the courts within reasonable bounds. Thus, where an infant's claim for damage for an assault and ⁵⁴¹ battery had been submitted and the amount awarded had been paid him. In a subsequent suit brought by him for the same cause of action it was held that the jury should take into consideration the sum paid; if they thought it sufficient compensation they should give only nominal damages; if they thought it insufficient, they should make up the deficiency. Whether or not equity will decree an award to be binding upon an infant seems a matter of doubt, depending much upon the merits of the case": Morse on Arbitration, p. 4. So in 3 Cyclopaedia, 588, the power to submit in any

case is said to exist only "where there is a capacity to contract, with a liability to pay," and the power to enter into the contract of submission to arbitration must needs be commensurate with such legal capacity of the parties to it. It must therefore be that, in the case of infants, as their contracts are only voidable, their agreements to arbitrate must, generally speaking, be voidable and not void: 2 Am. & Eng. Ency. of Law, 2d ed., 616. And so it was expressly adjudged in *Britton v. Williams*, 20 Va. (6 Munf.) 453, the court saying: "Although infants are bound by judgments had under the superintendence and protection of the court, yet where the case is referred to arbitrators, whereby they are deprived of that protection, a submission by infants, even by rule of court, ought not to be sanctioned. For as awards are in the nature of judgments and are to be final and conclusive, which cannot be where one party has a right to avoid them, it follows that a submission by infants, although with adults, cannot be obligatory on either party." The court held that as there was no valid submission in the case, there could be no award; and consequently the judgment should be reversed as far back as the writ. The same doctrine was announced in *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88, where it was said that infants are supposed to be destitute of sufficient understanding to contract, and the law therefore protects their weakness and ⁵⁴² imbecility, so far as to allow them to avoid all their contracts, by which they may be injured, including agreements which involve a release of their rights, as the law presumes that they have not sufficient discretion to put a fair value upon them. For the same reason, if an infant submit his rights to arbitration, he will not be bound by the award, from a presumed incompetency to choose suitable arbitrators and a lack of sufficient judgment to properly care for his own interests, and he is thus protected until he attains his majority. It follows from what we have said that as an infant cannot convey an irrevocable title to another, he cannot submit to an award which would give the latter such a title.

Nor has a guardian ad litem or next friend the power to submit for the infant, even though the submission be a rule of court. "He cannot change the tribunal or the principles of decision": *Morse on Arbitration*, 25; *Fort v. Battle*, 13 Smedes & M. 133; *Hannum v. Wallace*, 9 Humph. 129. But it can make no practical difference in this case whether the award and judgment are void or voidable, as the infants in

their complaints have alleged that the award was made and the judgment was rendered in a suit which was conclusive and fraudulent, and therefore that they are void. This would seem to be a sufficient disaffirmance of them, and, indeed, the language is quite positive and unequivocal in meaning. If they are to be set aside and disregarded, what difference can it make if it be done because they are void or voidable?

There is a more serious question to be considered and one the solution of which may be still more fatal to the award. The original suit was brought to have the life estate declared forfeited for waste, for damages for the waste committed and for the cancellation of the deeds of the defendants. The arbitration reverses the object and the purpose of the suit and converts it into a proceeding to validate the deeds and ⁵⁴³ thereby to save the life estate from forfeiture and to prevent the recovery of damages and to give the plaintiffs, in lieu of their just rights, which were too well established to be even the subject of any controversy, a sum of money so small in comparison with the real value of their land as to lead anyone to exclaim "they got the infants' land for nothing": *Collins v. Davis*, 132 N. C. 111, 43 S. E. 579; *Worthy v. Caddell*, 76 N. C. 82.

The agreement, if there was any with the next friend of the infants, was one-sided in its operation and unequal in its effect. It did not require any arbitration or even consideration of the plaintiffs' rights, but only an appraisement of property and a statement of the payments made by the defendants, not to plaintiffs but to their father, in order that the defendants might, by the payment of the balance, or the difference in the amounts, acquire a valid title to the plaintiffs' land. If we can properly call such a proceeding an arbitration, it is not such a one as a court of equity should enforce or allow to stand in the way of the plaintiff's recovery. Indeed, we doubt if the court had the necessary jurisdiction, even in equity, to proceed thus to dispose of an infant's land, although it may have had the consent of the parties. It unquestionably has a general jurisdiction over the estate of an infant and may sell his property, if it deems it for his interest and advantage to do so (*Williams v. Harrington*, 33 N. C. 616, 53 Am. Dec. 421), but not dispose of it in the manner adopted, or for the purposes intended in the former suit: *Troy v. Troy*, 45 N. C. 85. There must be some attempt at least by the next friend to protect the rights of the

infant. In this case, it appears that one of the parties gets an interest in the land without paying anything whatever to the infants, and the others acquire their interests at a most inconsiderable sum. In the language of Ruffin, J., speaking for the court: "It would be a plain violation of right to leave the ⁵⁴⁴ judgment standing, so as to operate as an estoppel upon these infants, when the court can see that no real defense was ever made for them": *Larkins v. Bullard*, 88 N. C. 35.

The fact that judgment was entered upon the award according to the agreement in the submission does not, under the circumstances of this case, impart validity to it. The judgment was by consent and is as open to attack as the submission and award.

Without discussing the matter more fully, we think there was evidence tending to establish the plaintiff's contention, which should have been considered by the jury upon each of the issues submitted.

The plea that they are purchasers for value and without notice cannot avail the defendants. It is freely admitted to be the general rule, as argued by the defendants' counsel, that innocent purchasers or those who have purchased at a judicial sale without notice of any irregularity in the proceedings and judgment, under which the sale was made, will be protected when it appears that the court had jurisdiction of the parties and of the subject matter of the proceedings, and that the judgment on its face authorized the sale. This is but another way of stating the general principle that the judgment or decree of a court, having general jurisdiction over a subject matter, subsisting unreversed, must be respected, and sustains all things done under it, notwithstanding any irregularity in the course of the proceedings or error in the decision: *Williams v. Harrington*, 33 N. C. 616, 53 Am. Dec. 421. Such a judgment will therefore sustain the title of a purchaser at a sale made under it, if he had no notice of the alleged defect in the proceedings: *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455; *England v. Garner*, 90 N. C. 197. But in our case the irregularities and defects are of such a nature, and are so apparent upon the face of the record in the former suit, that the defendants in that suit and those who ⁵⁴⁵ now claim to hold under them must be presumed to have had notice of said defects. So far as the irregularity in appointing the next friend of the plaintiffs is concerned, it would seem that the observations of the court in *Morris v. Gentry*, 89 N. C.

at pages 254, 255, are sufficient to overcome the defendants' plea of a want of notice as to it. We do not decide, though, how this is, as the arbitration, award and judgment were all by consent in a case where it appeared in the record that the plaintiffs could not consent by themselves, by their next friend or by the attorneys. There was a patent defect in the proceedings which should have been noticed by anyone claiming under the judgment. In the cases cited by the defendants' counsel, the defect did not appear on the face of the proceedings, but so far as the record in those cases showed, the court had proceeded regularly in the exercise of its jurisdiction over the parties and the subject matter, although it afterward appeared that in fact it had not done so.

But while the plaintiffs may be able to avoid the judgment and recover their property, they must observe the maxim that he who asks equity must do equity. If they insist upon their disability and the defect in the proceedings for the purpose of invalidating the title of the defendants, they must, when properly called upon to do so, restore any money they have received under the judgment of the court, or if the money has been invested in land or other property, they must surrender the latter. Neither an infant nor a married woman will be permitted to repudiate a transaction upon the ground of a want of capacity, or for other sufficient cause, and at the same time retain and enjoy any benefit derived from it. But the receipt of money or anything else of value by the persons under disability during the course of the transaction does not take away the right ⁵⁴⁶ of election to repudiate it. Equity will restore his or her property to the disaffirming party, but the person who thus loses it will be permitted to recover any money paid upon the faith of the validity of the transaction, provided the money is then in hand or the property into which it has been converted can be reached by a proceeding in rem: *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694; *Hodge v. Powell*, 96 N. C. 64, 60 Am. Rep. 401, 2 S. E. 182; *Walker v. Brooks*, 99 N. C. 207, 6 S. E. 63; *Draper v. Allen*, 114 N. C. 50, 16 S. E. 61.

This brings us to the conclusion that there was no error in our former decision, though somewhat different reasons may have been given for that decision than those which are now assigned.

Petition dismissed.

Hoke, J., took no part in the decision of this case.

The Power of a Guardian ad litem or next friend to bind his ward by a submission to arbitration is generally denied: See the monographic note to *Fletcher v. Parker*, 97 Am. St. Rep. 1000.

An Infant's Submission to Arbitration is voidable but not void: See the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 619.

The Necessity of an Infant restoring the consideration or placing the other party in statu quo, when he disaffirms his contract on the ground of infancy, is discussed in the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 687-694. Some authorities affirm in general terms that a minor is not obliged, in order to avoid his contract, to put the other party in statu quo: *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 100 Am. St. Rep. 560; *Gillis v. Goodwin*, 180 Mass. 140, 91 Am. St. Rep. 265. Compare *Rice v. Butler*, 160 N. Y. 578, 73 Am. St. Rep. 703. In case, however, he has not parted with the money or property received through his contract, he will probably be required to restore the same as a condition precedent to a rescission: *Jenkins v. Jenkins*, 24 Utah, 108, 91 Am. St. Rep. 783; *United States Inv. Corp. v. Ulrickson*, 84 Minn. 14, 87 Am. St. Rep. 326; *Hobbs v. Nashville etc. Ry. Co.*, 122 Ala. 602, 82 Am. St. Rep. 103. But if he has parted with the consideration, and placed it beyond his power to put the other party in statu quo, perhaps this does not bar him from making a disaffirmance: *Bullock v. Sprowls*, 93 Tex. 188, 77 Am. St. Rep. 849; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464.

KORNEGAY v. MILLER.

[137 N. C. 659, 50 S. E. 315.]

REMAINDERS, Contingent—Assignment of.—The assignment of a contingent remainder where the person who is to take is certain, though the consideration for the assignment is nominal, vests the equitable title in the assignee from the time of the assignment, whose title, on the happening of the contingency, requires nothing further to perfect it. (p. 513.)

A. C. Davis, for the appellant.

Aycock & Daniels, for the respondent.

CONOR, J. James F. Kornegay at the time of his death was seised in fee of a tract of land in the city of Goldsboro, containing about fifteen acres, of which the land described in the complaint is a portion. Said Kornegay died on the 13th of August, 1883, having executed his last will and testament appointing his son W. F. Kornegay executor thereto, which was duly proven and the executor thereto qualified. The testator left surviving, his

children, the said W. F. Kornegay, John J. Kornegay and the plaintiff, A. U. Kornegay, and his widow, Fannie E. Kornegay. Item 7 of said will is in the following words: "I give to my wife Fannie, during her life and no longer, the dwelling and lot where I now reside, embracing the yard and garden and all buildings adjoining the same on the east side of the stock lane, together with ~~660~~ one-half of the lucerne lot on the west side of said lane." By item 11 of his will he gave the residue of his estate, together with the land devised to his wife for life, to his son, the said W. F. Kornegay, to hold in trust for his other two sons to be divided equally between them. He authorized the said trustee to rent out the said real estate or to sell such portion or all of it as in his judgment he might deem best and to invest the proceeds for the benefit of his said two sons. By item 13 he appointed the said W. F. Kornegay guardian to the said Albert U. Kornegay, directing that he manage his portion of the estate and settle with him when he should attain his majority. By item 14 he directed that if either of his said sons, John J. or Albert U., should die without offspring, the portion of his estate given to the one so dying should pass to the survivor, and if both should die without offspring, the income arising from both their portions should be paid to his wife, Fannie E. Kornegay, during her life or widowhood, and then said property to pass to his son W. F. Kornegay. That said W. F. Kornegay died on the 31st of October, 1894, without issue and leaving the said John J. and Albert U. Kornegay his only heirs at law; that by his last will and testament he gave his estate, after the payment of his debts, to his widow, Mrs. Annie L. Kornegay, during her life or widowhood, and upon her death or at her marriage he gave his said estate to his brothers, John J. and Albert U. Kornegay, and Annie D. Slocumb, to be divided equally between them. After the death of the said W. F. Kornegay the said John J. Kornegay died intestate and unmarried, leaving the plaintiff his only heir at law. Thereafter, on the ninth day of January, 1905, the said Annie D. Slocumb executed and delivered to the plaintiff a deed conveying for the consideration of one dollar all of her right, title and interest, present, contingent and prospective, in and to all the property of every character devised by the last will and testament of

the said ⁶⁶¹ James F. Kornegay, and all of the right, title and interest which may have passed, or may hereafter pass to her under the last will and testament of W. F. Kornegay. That thereafter the said Annie L. Kornegay intermarried with Charles Dewey. That Fannie E. Kornegay, wife of James F. Kornegay, is now living. Plaintiff A. U. Kornegay arrived at full age on September 17, 1892, and on the ninth day of January, 1905, contracted in writing to convey to the defendant, for the consideration of twelve hundred dollars, a portion of the land devised by the said James F. Kornegay as hereinbefore set forth, a description of which is set forth in the complaint; pursuant to the terms of said contract the plaintiff executed and tendered to the defendant a deed in fee with full covenants of warranty for the said land, duly executed by the plaintiff, A. U. Kornegay, and by the said Fannie E., widow of the said James F. Kornegay, and demanded payment of the consideration agreed upon, which has been refused. The defendant avers that he is ready, willing and able to perform his part of the said agreement, if upon the foregoing facts the deed tendered to him conveys an indefeasible title in fee to said land. His honor being of opinion that the deed tendered conveyed to the defendant a good and indefeasible title to said land, rendered judgment for the plaintiff, to which defendant excepted and appealed.

The construction of this will was before this court in *Kornegay v. Morris*, 122 N. C. 199, 29 S. E. 875. The facts, in the light of which we are now called upon to construe the will and pass upon the plaintiff's title, differ from those set out in that case, in that Fannie E. Kornegay was then made a party defendant and adopted the ⁶⁶² answer of the defendant Morris, which alleged that the plaintiff in that case could not convey a clear and indefeasible title, and it was so held. In this case the said Fannie E. Kornegay joins in the execution of the deed. In the opinion filed by Mr. Justice Furches, after considering the several contingencies provided for in the will, he says: "But if Albert dies without leaving issue, the widow Fannie E. is to have the 'income' from the estate left John and Albert, until her death or marriage. This gives her a contingent estate in this property. Her estate is also contingent, depending upon the death of Albert without

leaving issue. This contingency may never happen, and she may never receive any benefit from this estate. But if Albert should die without leaving issue, before she dies or marries, she may then enforce the collection of the rents arising therefrom upon or against the lot itself, as this income would be a lien on the property itself." The two questions therefore presented for our decision in this case are whether the contingent interest of Fannie E. Kornegay can be assigned or conveyed by her deed and whether Mrs. Annie Slocumb has parted with the contingent interest which she took under the will of W. F. Kornegay. In *Watson v. Smith*, 110 N. C., at page 6, 28 Am. St. Rep. 665, 14 S. E. 640, Shepherd, J., speaking of the effect of a deed conveying a contingent interest, says: "Taking the limitation to be either a contingent remainder or an executory devise, we are of the opinion that the interest of John W. Watson and others was at least a 'possibility coupled with an interest' and its assignment for a valuable consideration and free from fraud or imposition, while void in law, will be upheld in equity"; citing *Watson v. Dodd*, 68 N. C. 528, in which case Pearson, C. J., says that assignments of such contingent interest will be upheld in a court of equity, and that if the estate should afterward vest, the court would compel the assignor to make title in the absence ⁶⁶³ of fraud or imposition: *Gray v. Hawkins*, 133 N. C. 1, 45 S. E. 363.

The only doubt which we have had in disposing of the case is in regard to the effect of the deed executed by Mrs. Slocumb to the plaintiff. It would seem that when the will of James F. Kornegay was before the court in *Kornegay v. Morris*, 122 N. C. 199, 29 S. E. 875, no notice was taken of the fact that W. F. Kornegay executed a will devising his entire estate to his wife during her life or widowhood, remainder to his two brothers and Mrs. Slocumb. The case is discussed and disposed of upon the theory that the interest of W. F. Kornegay descended to his heirs at law. We find no difficulty in holding that Mrs. Fannie E. Kornegay, by joining with the plaintiff in the deed tendered the defendant containing appropriate words to release her contingent interest in the income as well as all title to the land with warranty, parts with her interest, the consideration being the full value of the land. Her

deed operates either by way of an assignment, valid and enforceable in equity or by way of estoppel: *Foster v. Hackett*, 112 N. C. 546, 17 S. E. 426; *Wright v. Brown*, 116 N. C. 26, 22 S. E. 313.

It is well settled that such contingent interest as W. F. Kornegay took under the will of his father passed under his will: Code, sec. 2140; *Fearne on Remedies*, sec. 752; *Underhill on Wills*, sec. 50; *Fortescue v. Satterthwaite*, 23 N. C. 566. His widow having married, the interest of her husband passed under his will to the plaintiff, his brother James J. and Mrs. Slocumb. James J. having died without issue, his interest passed to the plaintiff. Hence, if the plaintiff died without issue the title, subject to a charge to the extent of the income during the life or widowhood of Mrs. Fannie E. Kornegay, will pass to his heirs at law and Mrs. Slocumb. Mrs. Slocumb therefore upon the death of the plaintiff without issue, would take under the will of W. F. Kornegay a one-third undivided interest, subject to the right ⁶⁶⁴ of Mrs. Fannie E. Kornegay. It must be conceded that some obscurity rests upon the effect of an assignment of such interest by reason of expressions used by the judges. Such interests have been spoken of as possibilities and classed with bare expectancies, as that of a child to inherit from the parent, etc. Again, the validity of such an assignment has been sustained as an executory contract to convey, passing no present interest or estate but a mere right in equity to be enforced by suit when the contingency upon which the estate vests occurs. Such assignments are sometimes sustained upon the doctrine of estoppel, especially when the deed contains a warranty of title. It has also been held that an assignment of such interest, while not passing any present legal title or estate, does pass the equitable title of the assignor, which is perfected by converting the assignor into a trustee for the benefit of the assignee when the estate vests. This court in *Fortescue v. Satterthwaite*, 23 N. C. 566, by Daniel, J., said: "It is true, as stated in the argument, that a possibility cannot be transferred at law. But by a possibility we mean such an interest, or the chance of succession which an heir apparent has in his ancestor's estate. . . . But executory devises are not considered as mere possibilities, but as certain interests and estates."

After citing *Gurnell v. Wood*, Willes, 211, and *Jones v. Roe*, 3 Term Rep. 93, in which may be found an interesting review of the cases, the learned judge says: "In the last case the judges seem to have considered it as settled that contingent interests, such as executory devises to persons who were certain, were assignable. They may be assigned, says Atherly, page 555, both in real and personal estate, and by any mode of conveyance by which they might be transferred, had they been vested remainders." It is true that the deed in that case was sustained upon other grounds, but the language used shows the opinion held by the learned and eminent judge who wrote for Ruffin, Gaston and himself. In ⁶⁶⁵ *Bodenhamer v. Welch*, 89 N. C. 78, Ashe, J., discusses the question, with his usual clearness and learning, stating the distinction between a "mere possibility" and "a possibility coupled with an interest," which latter, he says, "may of course be sold, assigned, transmitted or devised; such a possibility occurs in executory devises, contingent remainders, springing or executory uses." He cites a number of authorities to sustain the proposition that such interests or estates may be assigned. In that case it was held that such an interest passed to the assignee in bankruptcy, and when sold by him vested in the purchaser. Judge Ashe notices the language of Pearson, C. J., in *Watson v. Dodd*, 68 N. C. 528, and says: "There can be no doubt, then, that the contingent interest of the bankrupt may be assigned, and whether assignable at law or in equity, whatever interest the bankrupt had vested in his assignee." In *Watson v. Dodd*, 68 N. C. 528, the question before the court was whether the interest of a contingent remainderman could, before the contingency happened upon which the estate was to vest, be subjected to sale for the payment of debts. That was the only question decided. Pearson, C. J., says *arguendo*: "If one entitled to a contingent interest of the kind we are treating of assigned it and received therefor a valuable consideration, and there was no fraud or imposition and the estate afterward vested, a court of equity would compel the assignor to make title or else would hold the estate as a security for the consideration paid, according to circumstances, under its jurisdiction of specific performance of executory contracts." This language is noted by

Shepherd, J., in *Watson v. Smith*, 110 N. C. 6, 28 Am. St. Rep. 665, 14 S. E. 640. He says: "It is possible he [Pearson, C. J.] had in mind the assignment of a mere possibility such as the expectancy of an heir at law, as in *McDonald v. McDonald*, 58 N. C. 211, 75 Am. Dec. 234. In *Bodenhamer v. Welch*, 89 N. C. 78, it is held that such an interest may be assigned (we suppose that an equitable assignment is meant), ⁶⁰⁶ and we are of the same opinion; but even if this were not so, it is clear that the assignment in question, if treated as an executory contract, may be specifically enforced against the assignors and their heirs, should the life tenant die without issue, and this is all that is necessary, according to the stipulations in the case agreed, to entitle the plaintiff to the relief he asks. The plaintiff, the life tenant, has by the assignment acquired an equitable right to the interest of the remainderman." We have quoted the language of the learned justice for the twofold purpose of showing that the decision is based upon the agreed facts in that case, and that by the assignment the plaintiff acquired an equitable right to the interest of the remainderman and not a mere right in equity to file a bill for specific performance. In *Watson v. Dodd*, 68 N. C. 528, it is said that the assignment will be sustained as an executory contract if based upon a "valuable consideration." In *Wright v. Brown*, 116 N. C. 26, 22 S. E. 313, it is said the consideration necessary to sustain the assignment must be "sufficient." In other cases the court uses the term "a fair consideration." If the deed of Mrs. Slocumb operates only as an executory contract and all that is acquired is a right to sue for specific performance, we should hesitate to declare that the defendant acquires a "good and indefeasible title" to the land. It is evident that he is paying the plaintiff full value for the lot. If his title in respect to the interest of Mrs. Slocumb is dependent upon the view which a judge or jury may take at some uncertain time in the future of the adequacy of the consideration paid her by the plaintiff, when probably, by reason of the growth of the city, or the placing of valuable improvements on the property, it has enhanced in value, and the parties to the transaction are dead, we should not compel him to pay his money and take the risk of the result of a lawsuit. Before the defendant is

required to complete the purchase and pay the money he should have something more than the mere right to sue for ⁶⁶⁷ specific performance of an executory contract. The basic principle upon which such assignments are sustained should be settled—certainly so far as the question of consideration is concerned. Of course if any “fraud or imposition” be practiced upon the remainderman the deed or assignment would be set aside as in case of and under the same equitable principles as other deeds. An examination of the authorities and text-books develops an effort of the judicial mind to escape from the uncertainty which has oppressed the subject and bring the law into harmony with the well-recognized principle enlarging the power to assign things in action in the same manner and with the same certainty as things in possession. The general subject underwent an exhaustive examination in the case of *Holroyd v. Marshall*, 10 H. L. Cas. 209. Mr. Bispham, in his very able work on Equity, sixth edition, 236, says: “The true ground upon which this and similar decisions are to be placed appears to be, that a court of equity enforces such assignments on the ground that the assignee is entitled to have specific performance of the contract to assign, as soon as the property comes into existence, in the hands of the assignor. But it must not be understood by this remark that the assignor’s right is merely in the nature of a right to the specific performance of executory contracts, or is to be measured by the limitations by which that equitable remedy is controlled. The assignee’s right is something more. It is a present title not existent at law, but thoroughly recognized in equity; and to that title equity stands ready to give full effect the instant the property comes into being. It is true that neither in equity nor at law can a contract to transfer property, not then in existence, operate as an immediate and complete alienation, for the simple reason that there is nothing which can be immediately transferred. But instantly upon the acquisition of the thing, the assignor holds it in trust for the assignee, whose title ⁶⁶⁸ requires no act on his part to perfect it. The assignee therefore has an equitable title from the time of the assignment.” The principle thus stated by Mr. Bispham has been and is now uniformly applied to mortgages of after-acquired property. Cer-

tainly it would seem equally applicable when the subject matter of the assignment is a contingent remainder—the person who is to take being certain. By the statute of wills such interests are made devisable, and by act of parliament and the legislatures of several states, made the subject of a conveyance at law: Hopkins on Real Property, 305. While there is no statute in this state upon the subject, the legislature at its session of 1903 provided for the sale of such interests by the courts for the purpose of re-investment. In the deed executed by Mrs. Slocumb with her husband, the interest which she had and with which she parts is described by reference to the two wills under which she acquired it. She expressly disposes of such interest as she now has or may hereafter have in the property. This form of conveyance prevents the operation of an estoppel: Wellborn v. Finley, 52 N. C. 228. It, however, clearly appears that she understood what her rights were and intended to effectually part with them.

Without bringing into question the decision in Watson v. Dodd, 68 N. C. 528, or any of the cases cited, we think that we should, so far as possible, consistently with elementary principles of law, hold that the deed of Mrs. Slocumb operates to vest in the plaintiff the equitable title to all of the interest, title and estate which she has or may, by the happening of the contingency provided for, have in the locus in quo; that this title is something more than the mere right in equity; that in the event of the plaintiff's death without offspring, the title will be perfected without any act on the part of the plaintiff or those claiming under him; that the consideration agreed upon by the parties is sufficient and adequate to pass ⁶⁶⁹ such equitable title, and sustain it in the event the perfect title shall come to Mrs. Slocumb or her heirs.

We have given the subject a somewhat extended examination because of the uncertainty surrounding it. We feel that in the conclusion which we have reached we are promoting the wise and salutary policy of the law, which seeks to liberate titles from obscure and uncertain limitations and render alienation easy and simple. There are few greater clogs upon the growth of the industrial life of a people, or the encouragement of home building, than obscurity, uncertainty and insecurity of titles to land. In

respect to transfers or assignments of mere possibilities, especially expectant interests in the estates of parents, we adhere strictly to the principles announced by this court in *McDonald v. McDonald*, 58 N. C. 211, 75 Am. Dec. 234; *Mastin v. Marlow*, 65 N. C. 695; *Boles v. Caudle*, 133 N. C. 528, 45 S. E. 835; *Bispham on Equity*, 241. Such assignments are not promotive of either the moral, social or material welfare of the people, and should be anxiously and jealously watched by the courts. It will be an evil day for us when children spend their inheritance before it comes to them, encouraging manifold evils to themselves and to society. The judgment of the court below must be affirmed.

Hoke, J., dissenting.

The Assignment of expectancies is considered in the monographic note to *McCall v. Hampton*, 56 Am. St. Rep. 339-361; and the transfer of contingent remainders is discussed in the note to *Snelling v. Lamar*, 17 Am. St. Rep. 839-843. Contingent interests and expectancies may be assigned so as to be binding in equity: *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 124. This applies to the conveyance by an heir of his expectancy in the estate of his ancestor or next of kin: *Hale v. Hollon*, 90 Tex. 427, 59 Am. St. Rep. 819. Compare, however, *McCall v. Hampton*, 98 Ky. 166, 56 Am. St. Rep. 335.

THOMPSON v. CRUMP.

[138 N. C. 32, 50 S. E. 457.]

SHELLEY'S CASE, Rule of, When Inapplicable.—If a freehold is given to one person, remainder to the heirs of the body of that person and another, and such persons are capable of having a common heir of their bodies, the rule in *Shelley's Case* does not apply, and such heir takes by purchase a contingent remainder in fee simple, and the original taker receives an estate for life only. (p. 516.)

SHELLEY'S CASE, Rule of, Devise, When does not Fall Within.—A will devising to the testator's son all his lands for and during his life, and after death, to the lawful heirs of such son born of his wife, the words "born of his wife" qualify and explain the words "his lawful heirs," and confine the remainder to the children of that wife, and prevent the operation of the rule in *Shelley's Case*. (p. 516.)

Redwine & Stack, for the plaintiffs.

Williams & Lemmond, for the defendant.

³² BROWN, J. This is a special proceeding brought before the clerk of the superior court of Union county for the partition of certain lands. The facts which present the particular question to be determined are not disputed and are as follows: James W. Thompson, deceased husband of T. E. Crump, one of the defendants in this action, by virtue of the will of his father, L. B. Thompson, took and up to the time of his death was possessed of two tracts of land consisting of one hundred and fifteen acres. The item of the will, by which this land passed to James W. Thompson, is as follows: "I give and bequeath unto my son, James W. Thompson, all my lands which I now or ³³ may hereafter own for and during his life, and after his death to his lawful heirs, born of his wife, and in case he shall have no such heirs to take the estate, in that case it is my will and desire that it go to his full sister F. Bogan and children, and in case there be none of that class, then I allow it to go to James W. Thompson's half sister, C. E. Hargett." The petitioners and defendants in the special proceeding, with the exception of one Redwine, who became the owner of a certain share by purchase, and T. E. Crump, widow, are the lawful children of James W. Thompson. In answer to the petition for a sale and division of the one hundred and fifteen acre tract, which is the land mentioned in the will of L. B. Thompson, defendant, T. E. Crump alleges that she is entitled to dower therein. The clerk of the court, before whom the proceeding was commenced, ruled that she was not entitled to dower. The defendant appealed to his honor, M. H. Justice, judge, at chambers, who affirmed the ruling of the clerk, and from his judgment the defendant appeals to this court.

The application of the rule in Shelley's Case to the item of the will by virtue of which James W. Thompson took and remained in possession of the two tracts of land comprising one hundred and fifteen acres is the sole question presented for our determination. If the rule applies, and James W. Thompson died seised in fee of the premises conveyed, then it is plain that T. E. Crump, his widow, would be entitled to dower in the land. But if there are superadded words so limiting and qualifying the estate bequeathed to James W. Thompson as to make the rule inapplicable, then his "lawful heirs," by virtue of the will ³⁴ would take, by purchase, a contingent remainder in fee simple, thus destroying the widow's right to dower.

There can be no doubt that the item of the will presented for our consideration does contain words of qualification which prevent the application of the rule in Shelley's Case. The words "born of his wife" qualifying and explaining "his lawful heirs," confine the remainder to the children of his wife and prevent the operation of the rule. The superadded words show that the deviser intended to make the words "lawful heirs" a *designatio personarum*—that is, they show an intention on his part to limit the remainder over to a particular class of heirs. This case falls plainly within the rule that, where a freehold is given to one person, remainder to the heirs of the body of that person and another, and such persons are capable of having a common heir of their bodies, the rule in Shelley's Case does not apply, and the heirs of their common bodies take by purchase a contingent remainder in fee simple, and the original taker receives merely an estate for life: *Dawson v. Quinnerly*, 118 N. C. 188, 24 S. E. 483.

In holding that the interest of James W. Thompson was only an estate for life, with remainder over "to his lawful heirs, born of his wife," we have adhered strictly to the view that the rule in Shelley's Case is a rule of law and not of construction, but, in so doing, we have also carried out what seems to us to be the plain intention of the deviser, whose will we are considering. It is our opinion that James W. Thompson took only an estate for life in the one hundred and fifteen acres, and his widow is not entitled to dower therein.

Affirmed.

The Rule in Shelley's Case will be found discussed in the notes to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 100-107; *Polk v. Faris*, 30 Am. Dec. 415-417. A conveyance in form a fee simple, except that in the description of the property the words "the above-named land to be held by R. during her natural life, then to be distributed equally between her remaining heirs," is governed by the rule in Shelley's Case and vests a fee in R.: *Davenport v. Eskew*, 69 S. C. 292, 104 Am. St. Rep. 798, and see the cases cited in the cross-reference note thereto.

**FIREMAN'S INSURANCE COMPANY v. SEABOARD
AIR LINE RAILWAY.**

[138 N. C. 42, 50 S. E. 452.]

EVIDENCE.—Records of Entries Made in the usual course of business based upon reports made by one whose duty it is to make such reports, but who is not required to make and keep any record of the transaction, are admissible in evidence upon the ground of necessity. (pp. 524, 525.)

EVIDENCE—"Train Sheets."—Records of entries made in the usual course of business on "train sheets" by a train dispatcher from reports telegraphed to him by station agents as to the arrival and departure of trains are admissible in evidence to show the position and place of a train at a certain time. (p. 525.)

RAILROADS—Fires—Presumption.—If a fire originates from sparks from a railroad engine, it is presumed that such sparks were negligently emitted and if such presumption is not rebutted, a person suffering loss from such fire is entitled to recover from the railroad company. (p. 525.)

Busbee & Busbee and Douglass & Simms, for the plaintiffs.

Day & Bell and T. B. Womack, for the defendant.

43 CONNOR, J. Plaintiffs alleged that on the nineteenth day of October, 1902, certain cotton, upon which plaintiff companies had issued policies of insurance, was burned by the negligence of the defendant's agents and servants. That by reason of the destruction of said cotton plaintiffs were compelled to pay the value thereof; that the owners of said cotton transferred and assigned to the plaintiffs all rights of action which they had against the defendant company for the negligent burning thereof. Defendants denied the material allegations in the complaint. The parties went to trial upon the following issues:

"1. Was the property of the Hamlet Ice Company insured by the plaintiffs as alleged in the complaint at the time it was burned? Answer: Yes."

"2. Was the said property burned by the negligence of the defendant company, as alleged in the complaint? Answer: No."

From a judgment upon the verdict the plaintiffs appealed.

In the trial of this cause it became material to show at what time the defendant's wrecking train No. 371 reached Hamlet, the station on defendant's road, at which the cotton was burned. Defendant introduced one C. Lane, who testified that he was employed by the defendant road as train dis-

patcher on October 19, 1902; that it was his duty to keep a record of the arrival and departure of all trains at all telegraph stations; that the record was made and kept on the train sheet; at the ⁴⁴ time trains arrived at and left stations, the operator at such stations notified the dispatcher, who immediately recorded on the sheet the time as it was reported to him; that such sheet constituted a record of the arrival and departure of all trains. That he governed the movements of trains by such record; that on the 19th of October, 1902, the official report was sent him, and that he immediately recorded thereon the time of the arrival of the extra train, which was the wrecking train at Hamlet of that date, and that he had the record before him. The defendant then offered the record in evidence for the purpose of showing the time of the arrival of the wrecking train at Hamlet, which witness McDonald testified was taken charge of by shifting engine 371 on its arrival. Objection. The court ruled that the witness could refresh his recollection by an inspection of the record enabling him to speak touching his own acts at the time with regard to the matter under inquiry, but at that time ruled out the declaration which any other agent of the company made to him at the time by wire or otherwise. The witness stated that he could not state of his own personal knowledge the time at which the wrecking train arrived at Hamlet. The court admitted the record in evidence, showing the entries made by witness of statements made to him by wire from the agent of the defendant at Hamlet as to arrival and departure of said wrecking train, to which plaintiff duly excepted. Defendant also introduced one J. W. Hunt, who testified that he was employed by defendant company as conductor, and that as such he ran wrecking train on October 19, 1902, from Raleigh to Hamlet; that it arrived at Hamlet at 12:37. Witness is then shown a book which he identifies as a register showing the time of arrival, which he says is kept at Hamlet; that it was his duty to register the arrival of the train, and that he did register it on that day. He identifies the entry in his own handwriting. "Extra train. Time arrival, 12:37 P. M." Signed by him ⁴⁵ and also by engineman. This last record was offered by defendant in corroboration of witness Hunt, and the court admitted it for that purpose, so instructing the jury.

It is contended by the plaintiffs that the "train sheets" are not admissible because, while containing entries, made by the

train dispatcher in the usual course of business, he had no personal knowledge of the truth of the statements recorded; that he simply recorded information derived from the operator at Hamlet, a hundred miles or more distant from Raleigh. This, they say, is but hearsay. The defendant, on the other hand, contends that the entry made by the train dispatcher, although based upon information derived from the operator, by reason of the circumstances under and the manner in which the information was communicated, is surrounded by all possible safeguards against error, uncertainty or falsehood—and therefore comes within the exception to the general rule excluding hearsay evidence. The question is of first impression in this state. We have given it careful and anxious consideration, desiring to make no departure from the well-settled principles of the law of evidence, or the decisions of this court, at the same time recognizing, and keeping in view the duty of the court to make diligent effort to find in those general principles such safe and reasonable adaptability that in the changing conditions of social, commercial and industrial life there may be no wide divergence in the decisions from the standards by which men are guided and controlled in important, practical affairs. The law of evidence, based upon certain more or less well-defined general rules, evolved from experience, has been molded by judicial decision and legislative enactment into a system having for its end and purpose, and believed to be adapted to, the discovery of truth in judicial proceedings. Mr. Greenleaf says: "In the ordinary affairs of life we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon ⁴⁶ it would be unreasonable and absurd. The most that can be affirmed of such things is that there is no reasonable doubt concerning them." Professor Thayer says: "The law of evidence is the creature of experience rather than logic."

"The distinctions of the law are founded on experience not on logic. It therefore does not make the dealings of men dependent upon mathematical certainty": Holmes Com. Law, 156. "It is no doubt true that to a very great extent the law of procedure, as well as the primary law, is founded, not on the experience of isolated persons, but the general experience of men engaged in the business and vocation of life": 1 Elliott on Evidence, sec. 3.

The courts early adopted and have at all times rigidly adhered to the rule that witnesses, in testifying, must be confined to that which is within their personal knowledge, and that which is but hearsay must be excluded: 1 Greenleaf on Evidence, 16th ed., 98; 1 Elliott on Evidence, sec. 315. The wisdom of this general rule, and the reason upon which it is founded, are obvious and require no vindication or discussion. The courts, however, soon found from experience that unless exceptions were made to general rule, it would be impossible, in many cases, to establish the truth; that legal rights would be sacrificed and wrongs be without remedy. Judge Elliott says: "As already stated, it was conceived originally that witnesses should always be present, but this was found impracticable. In consequence, the general rule has become honey-combed with so-called exceptions. The grounds of making these exceptions differ as do the different exceptions. The ground as to some is that the hearsay is rendered necessary by the difficulty of other proof; as to others, the ground is that owing to the circumstances under which certain declarations were made, some guaranty of their reliability is furnished other than the mere fact of their having been made—that is, the circumstances add peculiar weight to this evidence, and dispense with the ordinary tests of credibility": 47 1 Elliott on Evidence, sec. 320. The general and well-recognized exceptions are stated in Elliott on Evidence, sec. 331; 1 Greenleaf on Evidence, 114. Professor Wigmore says that the reasons upon which the exceptions are based are "Circumstantial guaranty of trustworthiness and necessity": 11 Wigmore on Evidence, sec. 1420. The principle with its limitations is well stated by Jessell, M. R., in *Sugden v. St. Leonards*, [1875-76] L. R. 1 Pro. Div. 154 (241). He says: "Now, I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exception was that very difficulty. In the next place the declarant must be disinterested—that is, disinterested in the sense that the declaration was not made in favor of his interest. And thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be disposed to favor. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge, not possessed in

ordinary cases." Among the exceptions to the general rule we find: "Entries and declarations of third parties made in the regular course of duties or business." Such entries are of two kinds: 1. Those made by the entrant respecting a transaction, conducted by, or matter known to him personally in which no other person has taken any part; 2. Those made by the entrant upon information communicated to him by some other person acting in the line of his duty to make report to him. The entries made by the train dispatcher fall within this class. It is undoubtedly the general rule that if the entrant and the person making the report upon which the entry is made are both living and available, they should be produced to testify to the truth of the subject matter of the entry. That if one be living and available and the other dead or unavailable, ⁴⁸ that is, insane or beyond the process of the court, the entry may be introduced upon the testimony as to its authenticity of the living, available person. Can the entry be admitted when, as in the case before us, the entrant is living and the person upon whose report the entry is made is not produced, nor his absence accounted for? Mr. Greenleaf, referring to the decisions of the courts in respect to the admissibility of this class, says: "Other courts admit them [the entries] without accounting for the original observer, on the sound consideration that it is practically impossible in mercantile conditions to trace and procure every one of the many individuals who reported the transactions": 1 Greenleaf on Evidence, 120 (a). He says that other courts refuse to permit such entries to be introduced. Judge Elliott, quoting the language of Mr. Greenleaf, says: "We are inclined also to agree, in the main, with the writer quoted in the last preceding section, but not entirely without qualification. It may be—although as shown by the authorities there cited, there is sharp conflict among the authorities—that such entries are admissible, in a proper case, when duly authenticated, on proof that the informant knew the facts or properly reported them, even though he is not put upon the stand, especially if he is unavailable, and there are authorities looking very decidedly in that direction in addition to those referred to in the preceding section"; citing Meyer v. Brown, 130 Mich. 449, 90 N. W. 285; Continental Nat. Bank v. First Nat. Bank, 108 Tenn. 374, 68 S. W. 497; Donovan v. Boston etc. R. R. Co., 158 Mass. 450, 33 N. E. 583. Professor Wigmore, after a very interesting discus-

sion of the question in its several aspects, says: "The conclusion, then, is that when an entry is made by one person in the regular course of business, recording an oral or written report made to him by one or more persons in the regular course of business of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry, . . . provided the practical inconvenience of producing on the stand the numerous persons ⁴⁹ thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclusion be accepted by the courts? Such entries are dealt with in that way, in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employer affect the trust that is given to such books. It would seem that expedients which the whole business world recognize as safe could be sanctioned and not discredited by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements there cannot profitably and sensibly be one rule for the business world and another for the courtroom. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons, who as attorneys have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical." We have made these extracts from the works of three standard American authors on the law of evidence to show the trend of thought and opinion upon the admissibility of entries falling within the class under discussion. An examination of the decided cases discovers a conflict of authority. In *Fielder v. Collier*, 13 Ga. 495, the action was assumpsit for balance due on account. The defendant shipped to plaintiff for sale as commission merchants cotton upon which they obtained advancements. The cotton when sold brought less than the amount advanced. The action was brought for the difference. For the purpose of showing the items making up the account, including expenses of selling, etc., the plaintiffs offered to show a transcript from their books (this under the ⁵⁰ rule of practice in that state was admissible, if at all, as the original).

The testimony was upon objection excluded. Upon appeal, Lumpkin, J., said: "Shall this proof be received, or shall the plaintiffs be compelled to go behind the books thus verified by the clerks who kept them, and resort to each of the sub-agents who participated in the transaction and sale of this produce? Are not the entries thus made in the usual course of business of this extensive trading establishment, and as a part of the proper employment of the witnesses who prove them not only the best but the only reliable evidence which it is practicable to procure? They report to the clerks who keep the books of the concern, and their functions are performed. It is not reasonable to suppose that they can remember the multitude of transactions thus occurring every day. After the lapse of a very brief period, the clerks themselves could only call to mind what had been done by referring to their entries and memoranda." The exact question is presented and decided in *Donovan v. Boston etc. R. R. Co.*, 158 Mass. 450, 33 N. E. 583. The defendant offered for the purpose of showing the position of a train at a certain time, the train sheets kept by the dispatcher with the testimony of the person who made them. The facts are singularly like those before us in respect to the manner in which the entries were made. This may be explained by the fact that all railroads necessarily have some approved system of controlling the movement of trains and keeping a record thereof—using the telegraph offices on their line of road as the medium for communication. It would be impossible without the most disastrous results to do otherwise. Barker, J., says: "The failure to produce the East Summerville operator is relied upon by the plaintiff as one ground for his contention that the entries were not shown to be competent evidence." He proceeds to note cases holding inadmissible certain shop book entries, and says: "But no entries were transferred to the dispatcher's sheet from the sheet kept at the East ⁵¹ Summerville station. As telegraphic messages are read by sound, as well as automatically recorded in symbols, these entries stand upon the same footing as if made from oral statements uttered at the indicated station and audible in the dispatcher's office." The reasoning of the learned judge is so satisfactory to our minds that we quote his language: "It is clear that the sheet was worse than useless if its statements, as seen by the dispatcher, were not accurate. Every interest of the defendant demanded that an entry when made should be true, and

no reason can be conceived why the defendant should procure or permit a false or incorrect entry to be placed under the eye of the official who controlled the movement of its trains; nor is there any reason to presume that the operator who observed the passing of the train at the station and telegraphed the information to the dispatcher's office, or the person who there received the messages and made the entries on the sheet had any interest to mistake the facts or to make false entries. The system was the established course of the defendant's business, so that the sheet was not an accidental memorandum, and every step by which the information spread upon it was gathered, transmitted and entered, was an act performed by some person in the line of his duty and in the usual course of his employment under a sanction tending to make his statements true, and these acts were so connected with and dependent upon each other as to form parts of one transaction." The case most strongly relied upon by the plaintiffs sustaining their exception is *Pittsburgh etc. R. R. Co. v. Noel*, 77 Ind. 110 (121). The character of the entries do not very clearly appear. The court cites no authorities and disposes of the question quite summarily. It is simply stated that the defendant offered as evidence "the entries in books." It does not appear how they were authenticated, by whom or upon what basis they were made. The case is noticed by the Massachusetts court as being "Entries possibly similar." The decision is ⁵² not very satisfactory as an authority, because of the meager statement of the facts. Many of the cases cited by the plaintiffs are based upon construction of the "book debt laws" of the states. Some of them do not come within any of the exceptions to the general rule. We find no case directly in point, or giving us much aid in our reports. In *Fairly v. Smith*, 87 N. C. 367, 42 Am. Rep. 522, it was held that market reports published in newspapers when the information was gathered from reliable sources were admissible.

The record made by one appointed for that purpose by the signal service bureau of the state of the weather held admissible: *Knott v. Raleigh etc. R. R. Co.*, 98 N. C. 73, 2 Am. St. Rep. 321, 3 S. E. 735. Professor Wigmore suggests that when an entry is made in the usual course of business based upon reports made by one whose duty it is to make such report, but who is not required to make and keep any record of the transaction, the entry so made is admissible upon the ground of necessity growing out of the fact that it is not to be ex-

pected that the person making such report would remember the fact reported—and that he is therefore unavailable in a legal sense. It is not to be expected that an operator, who reports to the dispatcher the time of arrival and departure of a number of trains daily could undertake to testify from memory the hour and minute of each arrival or departure. He has no duty imposed upon him to do so. If he did undertake to testify, as in this case, three years after the event, but little credence would be attached to his testimony. For practical purposes he is as essentially unavailable as if dead or insane. We are of the opinion that applying either test, trustworthiness or necessity, the entries made on the train sheets were admissible. It has occurred to our minds that possibly the train sheet is admissible as a quasi public record. It is true that neither of the persons making it are sworn officers, yet it is well settled and now recognized by all courts that common carriers, in the operation of their trains, are discharging a public duty ⁵³ with many of the incidents attaching to public agencies. It would seem not unreasonable that courts should give to their records, made in the discharge of such duty, and meeting the other requirements of public records, the same recognition as is given to such records. It is not easy to see why this entry is not surrounded by the same “circumstantial guaranty of trustworthiness” as an entry made under similar conditions by a clerk in a public office. We do no more than suggest this view. The exception must be overruled. We deem it proper to say that in nothing said herein do we wish to be understood as opening the door to other testimony than that permitted by the statutes in force in this state in regard to book debts: Code, sec. 591, 2, 3; Acts 1897, c. 480. The plaintiffs requested his honor to charge the jury: “That if the jury shall find from the evidence that the fire originated from sparks from an engine of the defendant railroad company, the presumption is that the sparks were negligently emitted (and such presumption arises whether the fire started on the outside or inside of the compress building).” This was declined. His honor, at the request of the plaintiffs, charged the jury: “That if the jury shall find from the evidence that the fire originated from sparks from an engine on the defendant railroad company, the presumption is that the sparks were negligently emitted; and if the jury shall further find that the defendant railroad

company has failed to rebut such presumption, the jury should answer the second issue 'Yes.' "

We find no error in the refusal of the court below to give the third special instruction, and think that the fourth instruction given presented to the jury the law governing the defendant's liability, if they found that the defendant company burned the cotton. We have examined the entire record with care. His honor's charge is clear, full and correct. It would seem that the real question, around which ⁵⁴ the controversy was fought out and decided, was whether the cotton was set fire to and burned by the defendant's engine. The judgment must be affirmed.

For Recent Decisions bearing upon the principal case, see *Scott v. Astoria R. R. Co.*, 43 Or. 26, 99 Am. St. Rep. 710; *Callihan v. Washington Water Power Co.*, 27 Wash. 154, 91 Am. St. Rep. 829; *State v. Stephenson*, 69 Kan. 405, 105 Am. St. Rep. 171. Hearsay evidence is generally inadmissible to prove or disprove a material fact: *Washington v. Bank for Savings etc.*, 171 N. Y. 166, 89 Am. St. Rep. 800.

CLARK v. DURHAM TRACTION COMPANY.

[138 N. C. 77, 50 S. E. 518.]

STREET RAILWAYS—Passenger—Who is.—A person with a transfer ticket at a usual transfer point on a street railway, and with his foot on the steps of a car and his hand on the vestibule rod in the act of boarding the car, is a passenger, and entitled to recover if injured by the negligent starting of such car. (pp. 527, 528.)

STREET RAILWAYS—Duty of Conductor—Sudden Starting Negligence.—If a street-car has stopped for the reception of passengers, or if an intending passenger has signaled it to stop, and has put his foot upon the step of the car in the act of getting on, and is injured by the sudden starting of the car, he has a right to damages for his injury, whether the car employes starting the car knew that he was in the act of getting on or not. (pp. 529, 530.)

STREET RAILWAYS—Duty of Conductor—Negligence.—The conductor of a street-car is bound to know when he starts his car suddenly and with full force, that no person is attempting to embark and in a position of danger, and intending passengers must be safely on board before the conductor gives the signal to start. A failure to perform this duty is negligence, and the passenger is entitled to damages if he is thrown down and injured by the premature starting of the car. (p. 530.)

STREET RAILWAYS.—Persons Sick or Lame, or Children and Aged Persons are entitled to more care and attention from those in charge of a street-car, than those in full possession of their strength and faculties. They should be allowed more time in which to get on and off the car, and to secure a safe position therein. (p. 531.)

STREET RAILWAYS—Negligence—Personal Injury—Measure of Damages.—A passenger on a street-car injured through the negligence of the railway company's employes, is entitled to recover for actual suffering of mind and body, actual nursing and medical expenses, and for loss of time or loss from inability to perform ordinary labor, or capacity to earn money. (p. 531.)

Winston & Bryant, for the plaintiff.

Manning & Foushee, for the defendant.

⁷⁸ BROWN, J. The first proposition which is presented by several of the exceptions of the defendant brings up the question as to whether or not the plaintiff was a passenger on the defendant's line at the time of the injury sustained by him. The court charged the jury if they believed the evidence in the case to be true to find that the plaintiff was a passenger. In this instruction we see no error. The only testimony upon this point is that of the plaintiff himself and the testimony of the defendant's witness, Sorrell. We see nothing in the testimony of the latter tending to contradict the statement of the plaintiff as to his relation to the defendant company at the time of the injury. The plaintiff stated that he boarded the street-car of the defendant in East Durham, paid his fare, received a transfer for the Mangum ⁷⁹ street line, and was brought to the Mangum street connection; got off at the crossing of Main and Mangum streets for the purpose of boarding the other car and attempted to do so. The car stopped at the usual place for the transfer of passengers. Two men preceded him and boarded the car successfully. Plaintiff followed immediately behind, got hold of the rod on the west side of the vestibule at the end of the car with his right hand and put his foot on the steps of the car. Before he got his weight entirely on the car it started. At that time he had his right foot on the steps of the car and his right hand on the vestibule rod. No warning was given. The conductor was not present at that end of the car. Plaintiff says he saw the conductor sitting close to a young lady. No one helped him on the car. The car started suddenly and jerked the plaintiff down on the pavement. These uncontradicted facts, we think, justify the court in charging the jury that if they believed them to be true plaintiff was a passenger on the defendant's line. It is the settled law in this state, so far as steam

railroads are concerned, that when a person comes upon the premises of a railroad company at the station and has a ticket, or with the purpose of purchasing one, he becomes thereby a passenger of the company: *Tillett v. Lynchburg etc. R. R. Co.*, 115 N. C. 665, 20 S. E. 480; *Seawell v. Carolina Cent. R. R. Co.*, 132 N. C. 859, 44 S. E. 610.

The authorities in other states, where electric lines are more extensively operated than in this, all go to show that the same principle is applied to the operation of surface railroads whether operated by steam or electricity. The plaintiff had purchased a ticket, that is to say, he had paid his fare, and had boarded defendant's line in East Durham, and while on the car had received a transfer from one portion of the line to another. He got off at the usual place where passengers alight for the purpose of boarding the other car. The Mangum street car, which the plaintiff desired to board, stopped for the purpose of taking on passengers. Plaintiff, ⁸⁰ with his transfer in his pocket, approached the car with two other passengers, and at the time of the injury had one foot upon the steps of the car and his right hand hold of the rod. These facts plainly make him a passenger. Mr. Joyce, in his work on *Electric Law*, section 528, says: "A passenger on a street railway is a person whom the company has undertaken to carry by virtue of a contract, express or implied. To create the relation of carrier and passenger it is not necessary for one to have entered the car, but the relation may exist before a person has actually boarded a car." It has been held in several cases where a person had obtained a transfer ticket from one car which entitled him to ride on another car of the defendant company, and he had approached the car, standing to receive passengers, when the car started and he was thrown to the ground that such person is a passenger; *Washington etc. Ry. Co. v. Patterson*, 9 App. D. C. 243; *North Chicago St. Ry. Co. v. Kaspers*, 85 Ill. App. 316; *Keator v. Scranton T. Co.*, 191 Pa. St. 102, 71 Am. St. Rep. 758, 43 Atl. 86, 44 L. R. A. 546.

The person in transferring from one car to the other is still a passenger, the transfer being but a part of the trip for the whole of which the company agrees to convey in safety.

Was the defendant company guilty of negligence? His honor instructed the jury if they believed the evidence to

answer that issue "Yes." In this instruction we are likewise unable to discover any error. The evidence in the case was practically undisputed, and we do not see how any reasonable mind can draw more than one inference from it. In addition to what we have already quoted from the plaintiff's testimony, he testified that when he put his right foot on the steps of the car and before he got his weight on his foot the car started. No warning was given; he was jerked on the pavement; his shoulder was hurt; his leg was twisted and knee hurt, and he was dragged eight or ten feet before he got loose. The car then ran fifty or one hundred feet, and then came back. No one helped him on the car. ⁸¹ The conductor was not on the platform. After he was hurt he took the car and went on to his destination. After he reached home he went to bed and stayed four or five weeks. He suffered great pain and has used crutches ever since. Sent for the doctor. He further testified that before he was hurt his condition was as good as most men of his age. That he is eighty-four years old. That he did not use crutches before his injury, but had walked with a cane for twenty-five or thirty years. That he was on the west side when the car came up and motioned his hand to the motorman. Did not hear any bell. As he took hold of the handle of the car it started. He testified that Mangum street is a regular stopping place for the transfer of passengers. We see nothing in any of the testimony for the defendant which at all tends to contradict or modify in any way the plaintiff's testimony. Inasmuch as only one inference can be drawn therefrom, it was plainly the duty of the judge to instruct the jury as he did: Clark's Code, 3d ed., 531; Chesson v. Roper Lumber Co., 118 N. C. 67, 23 S. E. 925.

When the car stopped for the purpose of receiving passengers either from the street or those transferred from other cars, it was plainly the duty of the conductor to be at his station on the platform where passengers are in the habit of boarding the car. It was his duty to give them such assistance as was necessary in getting on and off the car and to see to it that the motorman was not signaled and the car not started until reasonable time had been given the passengers there assembled, who manifested intention to get on the car. The authorities show that

if a street-car has stopped for the reception of passengers, or if an intending passenger has signaled it to stop and has put his foot upon the step of the car in the act of getting on and is injured by a sudden starting, he will have the right to damages for his injury, whether the servants who started the car knew that he was in the act of getting on or not. Such person is entitled ⁸² to the care due a passenger and it is the conductor's duty to know before he starts his car whether any person is in the act of getting on or not. If the conductor is busy, it is not enough for him to wait a reasonable time for passengers to board the car, but it is his plain duty to look and see that intending passengers are safely on board before signaling the motorman to start: Thompson's Law of Negligence, sec. 3514; Clark's Street Railway Accident Law, p. 54; *Cohen v. West Chicago Ry. Co.*, 60 Fed. 698, 9 C. C. A. 223.

In the latter case it is said: "The conductor of street-cars is bound to know, when he starts his car suddenly and with full force, that no person attempting to embark is at that moment with one foot on the platform and the other on the ground, and with his hand upon the railing, in the act of getting on board, or is otherwise in a position of danger."

The adjudicated cases fully support the views of the eminent text-writers above cited: *Dudley v. Cable Co.*, 73 Fed. 129; *Norfold etc. Terminal Co. v. Morris*, 101 Va. 422, 44 S. E. 719; *Akersloot v. Second Ave. Ry. Co.*, 131 N. Y. 599, 30 N. E. 195, 15 L. R. A. 489.

In *Akersloot v. Second Ave. Ry. Co.*, 131 N. Y. 599, 30 N. E. 195, 15 L. R. A. 489, the New York court says: "The conductor of a street-car must see that a passenger entering the car is in a place of safety before he gives the signal to proceed, and the passenger is entitled to damages if he is thrown down and injured by the premature starting of the car."

"It is the duty of a conductor, before giving the signal to start, to look around and see that all passengers to take passage at that place are safely on board, and failure so to do is not excused by the fact that he does not see an intending passenger. The passenger has a right to rely upon the care and protection of the company's employes and he is not bound to prepare for or even anticipate a

sudden and unexpected start of the car which may throw him upon the ground": Nellis on Street Surface Railways, p. 461.

The authorities are all to the effect that a degree of ⁸³ attention beyond that due to ordinary passengers should be bestowed on those affected with a disability by which the hazards of travel are increased. The sick, the lame, children and aged persons are entitled to more care and attention from those in charge of a car than those in full possession of their strength and faculties. They should be allowed more time in which to get on and off the car and to secure a safe position therein: Sheridan v. Brooklyn etc. Ry. Co., 36 N. Y. 39, 93 Am. Dec. 490; Wardle v. New Orleans etc. Ry. Co., 35 La. Ann. 202; Booth on Street Railways, sec. 330.

These authorities seem to settle the question beyond any doubt that the plaintiff was not only a passenger upon the defendant's line, but that, if the evidence is believed to be true, he was injured by the negligence of the defendant's employés, and therefore, is entitled to recover damages for his injury.

His honor instructed the jury that "in this class of cases the plaintiff is entitled to recover as damages one compensation for all injuries past and prospective in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction for loss of both bodily and mental powers or for actual suffering both of body and mind which are the immediate and necessary consequences of the injury." The defendant excepted to the words "these are understood to embrace loss of time or loss from inability to perform ordinary labor or capacity to earn money." This instruction seems to be a verbatim quotation from Sutherland on Damages, volume 3, page 261, and is fully sustained by the numerous authorities there cited. It is also approved in totidem verbis in Wallace v. Western etc. R. R. Co., 104 N. C. 452, 10 S. E. 552.

Upon a review of the whole case and all of the exceptions, we are of opinion that there is no error, and that the judgment should be affirmed.

A Street Railway Company is negligent if it starts a car before a passenger has gained a secure foothold on the platform, but usually it is not required to wait until he has taken his seat, or even has entered the doorway, before starting: *Sharp v. New Orleans City R. R. Co.*, 111 La. 395, 100 Am. St. Rep. 488. See, in this connection, *Boulfrois v. United Traction Co.*, 210 Pa. St. 263, 105 Am. St. Rep. 809; *Redmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558.

As to Whether a Person Remains a Passenger while transferring from one street-car to another, see the note to *Duchemin v. Boston etc. Ry. Co.*, 104 Am. St. Rep. 587.

CAMERON-BARKLEY COMPANY v. THORNTON LIGHT AND POWER COMPANY.

[138 N. C. 365, 50 S. E. 695.]

CONTRACTS—Intoxication to Avoid.—A contract entered into by a person while he is so voluntarily intoxicated as not to know what he is doing, and as to dethrone his reason, is void, and he may plead his disability from such drunkenness to defeat the alleged contract. (p. 533.)

CONTRACTS—Intoxication to Avoid.—In order to avoid a contract on the ground of intoxication, the person making it must be so drunk at the time as to be incapable of knowing what he was doing. Mere inebility of mind, or inability to act wisely or discreetly caused by drink, is not sufficient to avoid the contract. (pp. 535, 536.)

T. M. Hufham, for the plaintiff.

E. B. Cline and S. J. Ervin, for the defendant.

³⁶⁵ **WALKER, J.** This action was brought to recover damages for the breach of a contract whereby the plaintiff agreed to sell and the defendant to buy a Corliss engine. The case was heard at a former term (137 N. C. 99, 49 S. E. 76), upon a petition for a certiorari. We ordered the writ to issue so that the plaintiff's exceptions and assignments of error could be more accurately stated. The judge who tried the case has made a very full and satisfactory return to the writ, and has given the plaintiff the benefit of every exception which could possibly be taken to the rulings of the court. The defect in the original case appears now to have occurred through no fault ³⁶⁶ of the judge, who was exceedingly liberal and accommodating toward counsel, agreeing for their convenience to appoint a place in the district to settle the case.

The defendant in its answer admitted that its president had signed a contract and pleaded specially that at the time of signing it he was so drunk that he did not have sufficient mental capacity to contract with the plaintiff for the engine. The court, without objection, submitted only one issue to the jury, which is as follows: "What damage, if any, is the plaintiff entitled to recover of the defendant?" The jury answered, "Nothing." Judgment was entered accordingly.

The question presented for our consideration arises upon an exception to the charge of the court regarding the drunkenness of the plaintiff's agent and its sufficiency to avoid the contract. It is held by some authorities to be a principle of the common law that every contract, which a man non compos mentis makes is avoidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by himself, received by the law to stultify himself and to set up his own disability in avoidance of his acts: *Beverly's Case*, 4 Rep. 123. And Coke, as appears in his Institutes, was of the same opinion: "As for a drunkard who is voluntarius daemon, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it": Coke on Littleton, 247a. But Blackstone observes that this doctrine sprung from loose authorities and he evidently agrees with Fitzherbert, who rejects the maxim as being contrary to reason: 2 Blackstone's Commentaries, 291. Whatever was the true principle of the common law as anciently understood, there can be no doubt that since the reign of Edward III, if not since the time of Edward I, it has been settled according to the dictates of good sense and common justice that a contract made by a person, so destitute of reason as not to know the nature and ³⁶⁷ consequences of his contract, though his incompetence be produced by intoxication, is void, and even though his condition was caused by his voluntary act and not procured through the circumvention of the other party. Mere imbecility of mind is not sufficient as a ground for avoiding the contract when there is not an essential privation of the reasoning faculties or an incapacity of understanding: 2 Kent's

Commentaries, 451. This court has adopted Coke's definition that a person has sufficient mental capacity to make a contract if he knows what he is about: *Moffit v. Wither-
spoon*, 32 N. C. 185; *Paine v. Roberts*, 82 N. C. 451. And it has been held not error to charge that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its full extent and effect: *Cornelius v. Cornelius*, 52 N. C. 593. The doctrine that a party may plead his own disability to defeat the alleged contract arises out of the very nature of a contract, which requires that the minds of the parties should meet to a common intent, and if one of them has not "the agreeing mind" the contract cannot be formed. In *Hawkins v. Bone*, 4 Fost. & F. 311, Chief Baron Pollock, said: "But the law of England is that a man is not liable on a contract alleged to have been made by him in a state in which he was not really capable of contracting. A contract involves a mutual agreement of two minds, and if a man has no mind to agree, he cannot make a valid contract"; and the question at last is whether he was wholly incapable of any reflection or deliberate act, so that in fact he was unconscious of the nature of the particular transaction. It is not necessary that he should be able to act wisely or discreetly, nor to effect a good bargain, but he must at least know what he is doing. So far as the legal incapacity is concerned, it can make no difference from what cause it proceeded, whether from the party's own imprudence or misconduct, or otherwise. It is the state and condition of the mind itself that the law regards, and not the causes that produced ³⁶⁸ it. If from any cause his reason has been dethroned, his disability to contract is complete: *Bliss v. Connecticut etc. R. R. Co.*, 24 Vt. 424. The master of the rolls (Sir William Grant) in *Cook v. Clayworth*, 18 Ves. 15, said: "As to that extreme state of intoxication that deprives a man of his reason I apprehend that, even at law, it would invalidate a deed obtained from him while in that condition." Lord Ellenborough in *Pitt v. Smith*, 3 Camp. 33, thus states the doctrine: "You have alleged that there was an agreement between the parties, and this allegation you must prove, as it is put in issue by the plea of not guilty; but there was no agreement between the parties if the defendant was intoxicated in the manner sup-

posed when he signed this paper. He had not an agreeing mind. Intoxication is good evidence upon a plea of non est factum to a deed, of non concessit to a grant, and of non assumpsit to a promise."

The authorities sustaining the view of the law we have stated and adopted are quite numerous: Clark on Contracts, 2d ed., p. 186; Parsons on Contracts, 9th ed., p. 444; Matthews v. Baxter, L. R. Ex. 132; Webster v. Woodford, 3 Day, 90; Van Wyck v. Brasher, 81 N. Y. 260; Bursinger v. Bank of Watertown, 67 Wis. 75, 58 Am. Rep. 848, 30 N. E. 290; Bush v. Breinig, 113 Pa. St. 310, 57 Am. Rep. 469, 6 Atl. 86; Bates v. Ball, 72 Ill. 108; Wright v. Fisher, 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605; 14 Cyc. 1103; 17 Am. & Eng. Ency. of Law, 2d ed. 399.

It was held in King v. Bryant, 3 N. C. 394, that if a man was so drunk at the time of signing a bond that he did not know what he was doing, and while in that condition he was induced to sign the instrument, it was a fraud upon him which vitiated the bond, even in an action at law upon it, and to the same effect is the decision of the court in Gore v. Gibson, 13 Mees. & W. 623—opinion of Parke, B. In the latter case, Pollock, C. B., said: "Although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the result ³⁶⁹ of the modern authorities is that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice."

We have examined the charge of the court with care and cannot find that his honor said anything not in strict accordance with the law, as we now declare it to be. He charged the jury as follows: "The mere fact that the defendant's president was drinking was not sufficient, but the jury must find that he was so intoxicated that he could not understand the nature and scope of what he was doing. If the jury find from the greater weight of the testimony that the agent was drinking, it would not be sufficient to invalidate the contract, but if the jury find that the defendant's president, at the time he signed the contract or order for the engine, was so drunk as to be in-

capable of knowing the effect of what he was doing, then the contract or order would not be binding upon the defendant. Whether or not he was so intoxicated as to render him incompetent to contract, is a question for the jury upon all the evidence." We think this was a clear and sufficient exposition of the law applicable to the facts of the case. What the judge said in his reference to the nature of the transaction in which the agent was engaged and its importance or magnitude, was not calculated in our opinion to confuse the jury or lead them away from the real question involved in the issue, but was evidently intended to point what he had already said as to the true test of mental capacity, and to impress upon them, as an essential condition of the validity of the contract, that the agent of the defendant at the time he signed the paper must have been sober enough to understand the nature of the transaction and the effect or consequence of his act, and not that he must have been able to act with wisdom or discretion. The particular transaction, and what the party did in respect to it, may have furnished some evidence of his mental condition. The effect of that part of ³⁷⁰ the charge to which the plaintiff excepted was to leave the whole transaction, with the evidence as to the agent's intoxication, to the jury, and in doing so no reversible error was committed. His honor told the jury that they must find that the agent was so intoxicated that he did not understand the nature and scope of the transaction, and that this was a question for the jury upon all of the evidence, a part of which necessarily was the transaction itself, whether in its nature large or small. Even if the illustration, as argued, was not a very apt one, it did no harm that we can discover.

No error.

CONTRACTS OF INTOXICATED PERSONS.

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XI. Habitual Drunkenness.

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I. Degree of Intoxication.

The degree of drunkenness which will afford ground for avoiding a contract has been variously defined by the courts of last resort, but the cases are everywhere agreed that unless a person was so intoxicated, where such intoxication was voluntary, as to render him incapable of exercising judgment, or of understanding the proposed transaction, and of knowing what he was doing when he entered into the contract it will be binding upon him.

Many cases lay down a very strict rule in this regard. Thus some of them say, that to render a transaction voidable on account of the drunkenness of a party to it, it must appear that he was so drunk as to have drowned reason, memory and judgment and impaired his mental faculties to an extent that would render him non compos mentis for the time being, especially when the other party to the transaction has not aided in, or procured, his drunkenness: *Bates v. Ball*, 72 Ill. 108; *Davidge v. Crandall*, 23 Ill. App. 360; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584.

In order to set aside a contract on the ground of drunkenness it is not sufficient that the party was under undue excitement from the use of liquor. It must be used to that degree which may be called excessive drunkenness where the party is utterly deprived of his reason and understanding: *Johnson v. Phifer*, 6 Neb. 401. To establish intoxication as a defense to the performance of a contract, it must appear that the intoxication of the person whose incompetency to contract is set up was so far complete that he was unable to understand what he was doing, the nature and effect of the act in which he was engaged, and the business he was transacting. In other words, the drunkenness must go so far as to destroy the reasoning power of the person whom it is sought to bind by a contract entered into by him while in that state of intoxication: *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567; *Hale v. Stery*, 7 Colo. App. 165, 42 Pac. 598; *Shackelton v. Seabee*, 86 Ill. 616; *Chicago etc. Ry. Co. v. Lewis*, 109 Ill. 120; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Jemers v. Howard*, 6 Blackf. 240; *Cummings v. Henry*, 10 Ind. 109; *Willcox v. Jackson*, 51 Iowa, 208, 1 N. W. 513; *Johns v. Fritchey*, 39 Md. 258; *Wright v. Fisher*, 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605; *Cavender v. Waddingham*, 2 Mo. App. 551; *Longhead v. Combs etc. Com. Co.*, 64 Mo. App. 559; *Burroughs v. Richman*, 13 N. J. L. 233, 23 Am. Dec. 717; *Waldron v. Angleman*, 71 N. J. L. 166, 58 Atl. 568; *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Foot v. Tewksbury*, 2 Vt. 97; *Loftus v. Maloney*, 89 Va. 576, 16 S. E. 749.

If a contract is made by a person so destitute of reason as not to know the consequences of his act, though his incompetency is produced by intoxication, it may be avoided, although such intoxication was voluntary and not procured by the circumvention of the other party: *Donalson v. Posey*, 13 Ala. 752; *Mansfield v. Watson*, 2 Iowa, 111; *Heirs of French*, 8 Ohio, 214; *Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 473, 57 Atl. 959; *Barrett v. Buxton*, 2 Aik. 167, 16 Am. Dec. 691.

Contracts made by persons under the influence of liquor, without being completely intoxicated, are governed by the same principles which apply to other cases where one party is in a position to expose him to the exercise of an improper influence by the other. If carried so far that the reasoning powers are destroyed, the contract is voidable, but when it falls short of this, the contract cannot be avoided unless undue advantage has been taken, by one party, of the intoxicated condition of the other: *Birdsong v. Birdsong*, 2 Head (Tenn.), 163. Intoxication merely as such never avoids a contract, and to render a transaction voidable on account of the drunkenness of the party to it, he must have been so drunk as to have drowned reason, memory and judgment, and this is especially so when the other parties connected with the transaction have not aided or procured his intoxication: *Bates v. Ball*, 72 Ill. 108. Thus, where a person intoxicated is able to sign a note, and the next morning to remember that he had done so and for what the note was given, a case of complete intoxication is not made out, such as will avoid the contract: *Caulkins v. Fry*, 35 Conn. 170. It is not alone the influence of liquor which avoids the contract, but it must be shown to exist to such an extent as to seriously impair the reasoning faculties at the time of the execution of the contract: *Pickett v. Sutter*, 5 Cal. 412. The fact that one of the parties to the contract at the time of its execution was to some degree intoxicated will not avoid the transaction, if the other party used no contrivance or management to draw him into drink, nor took any unfair advantage of his state of intoxication to obtain the deeds: *Belcher v. Belcher*, 10 Yerg. 121. Mere excitement from the use of intoxicating liquors is not such drunkenness as will enable a person to avoid his contract. Such excitement and drunkenness must be excessive and absolute so as to suspend the reason and create impotence of mind at the time of entering into the contract: *Cavender v. Waddingham*, 5 Mo. App. 457. Where a party to a contract is voluntarily intoxicated at the time of making it, to the extent only that he does not clearly understand the business, this does not render his contract void or voidable where no advantage is gained by dealing with him: *Henry v. Ritenour*, 31 Ind. 136. Drunkenness itself is no cause for avoiding a contract unless the party was drawn into it by the party with whom he contracted, or because of its excessiveness an unreasonable and unconscientious advantage was taken of his situation: *Camp-*

bell v. Ketcham, 1 Bibb, 406. It is no defense to a contract that defendant was so intoxicated when he entered into it, that he could not give the attention thereto which a reasonably prudent man would have given, since intoxication is not a defense unless the contracting party did not know what he was doing at the time: Wright v. Waller, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440. The mere fact that a person was intoxicated at the time, and not in a situation to judge correctly, or act with prudence, will not avail him to avoid the contract, unless he can show that it was procured by the connivance of the other party, or that an unfair or improper advantage was taken of his situation: Rodman v. Zilley, 1 N. J. Eq. 320; or the fact that his reason, memory, and judgment were impaired by the influence of drink, is not sufficient to constitute a defense, but to succeed he must show that he was so completely intoxicated as to be incapable of knowing what he was doing: Taylor v. Purcell, 60 Ark. 606, 3 S. W. 567.

II. Contract, Whether Void or Voidable.

There is quite a respectable line of decisions which hold that the contract of one made at a time when he was too voluntarily drunk to know what he was doing is wholly void: Taylor v. Purcell, 60 Ark. 606, 31 S. W. 567; Drummond v. Hopper, 4 Harr. (Del.) 327; Cavender v. Waddingham, 2 Mo. App. 551; Prentice v. Achorn, 2 Paige, 30; Hyman v. Moore, 3 Jones, 416. This rule that a contract given by one when too drunk to know what he is doing is wholly void, and not merely voidable, and therefore incapable of confirmation by the subsequent conduct of such party (Berkley v. Cannon, 4 Rich. 136), is directly opposed to the better rule sustained by reason and the great weight of authority, that although a person when in a complete state of voluntary intoxication so as not to know what he is doing, has no capacity to contract in general, yet his contract made at such a time is merely voidable and not wholly void, and may therefore be ratified by him when he becomes sober: Strickland v. Parlin etc. Co., 118 Ga. 213, 44 S. E. 997; Mansfield v. Watson, 2 Iowa, 111; Bush v. Brenning, 113 Pa. St. 310, 57 Am. Rep. 469, 6 Atl. 86; Carpenter v. Rodgers, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156. Among the very large number of cases which hold that a contract entered into by a person while he is so intoxicated as to be incapable of transacting business, and as not to know what he is doing, is merely voidable and not void, may be cited Mattair v. Card, 18 Fla. 761; Jones v. Williams, 42 Ind. 565, 13 Am. Rep. 377; Mansfield v. Watson, 2 Iowa, 111; Lacy v. Mann, 59 Kan. 777, 53 Pac. 754; Carpenter v. Rodgers, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156; Broadwater v. Darne, 10 Mo. 277; Eaton v. Perry, 29 Mo. 96; Longhead v. Combs etc. Com. Co., 64 Mo. App. 559; Fowler v. Meadow Brook Water Co., 208 Pa. St. 473, 57 Atl. 959; Williams v. Inabnet, 1 Bail. 343; Smith v. Williamson, 8 Utah, 219, 30 Pac. 753; Barrett v. Buxton, 2 Aik. 167, 16

Am. Dec. 699; *Wigglesworth v. Steers*, 1 Hem. & M. 70, 3 Am. Dec. 602; *Loftus v. Malony*, 89 Va. 576, 16 S. E. 749. A contract made by one who from excessive drunkenness is deprived of his reason, so that he is incapable of giving his serious deliberate consent to the act, may be avoided, both at law and in equity, although the party claiming under the contract may have had no agency in producing the intoxication: *Donelson v. Posey*, 13 Ala. 752. If a person executes a promissory note while he is so intoxicated that he does not know what he is doing, he has a right to avoid it, but if, after becoming sober he ratifies the transaction by keeping the consideration which he receives for the note, he cannot afterward avoid it: *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753.

III. Right to Plead Intoxication.

At this day there is no doubt of the right of a person to plead his own complete drunkenness at the time he entered into a contract in avoidance thereof. As was said in *Bush v. Breinig*, 113 Pa. St. 310, 57 Am. Rep. 469, 6 Atl. 86: "The rule formerly was, that intoxication was no excuse, and created no privilege or plea in avoidance of a contract; but it is now settled according to the dictates of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is voidable and may be avoided by himself, though the intoxication was voluntary and not produced by the circumvention of the other party." This language is repeated with approval in *Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 476, 57 Atl. 959. And such is the rule of all of the authorities at the present time: *Donelson v. Posey*, 13 Ala. 752; *Phelan v. Gardner*, 43 Cal. 306; *Hale v. Stery*, 7 Colo. App. 165; *Mattan v. Card*, 18 Fla. 762; *Bates v. Ball*, 72 Ill. 109; *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Mansfield v. Watson*, 2 Iowa, 111; *Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156; *Cavender v. Waddingham*, 5 Mo. App. 457; *Longhead v. Combs etc. Com. Co.*, 64 Mo. App. 559; *Johnson v. Phifer*, 6 Neb. 401; *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Birdsong v. Birdsong*, 2 Head (Tenn.), 289; *Barrett v. Buxton*, 2 Ark. 167, 16 Am. Dec. 691; *Conant v. Jackson*, 16 Vt. 335; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290. A note executed while the maker was so intoxicated as to be deprived of his understanding is voidable by him, although his intoxication was voluntary and not procured by the agency of the other party: *Barrett v. Buxton*, 2 Ark. 167, 16 Am. Dec. 691. A person may show, in order to defeat a contract made by him, that, at the time, he was incapable of contracting by reason of his intoxication: *Phelan v. Gardner*, 43 Cal. 306. In New Jersey the rule formerly prevailed that in order to avoid a contract either at law or in equity because of intoxication, it must be shown either that such intoxication was produced by act or connivance of the person against whom

the relief is sought, or that an undue advantage was taken of the situation of the drunken person. But this rule no longer prevails. In order to establish voluntary intoxication as a defense in cases of contract, it need only appear that the intoxication of the person who sets up his incompetency was so far complete at the time of contracting that he was unable to understand the nature and effect of the act in which he was engaged and the business he was attempting to transact: *Waldron v. Angleman*, 71 N. J. L. 166, 58 Atl. 568.

IV. Intoxication Procured by Other Party.

A contract made with an intoxicated person is avoidable where any undue advantage is taken of him by reason of his drunkenness. The statement is sometimes made that contracts procured from a drunken person when his intoxication is caused or aggravated by the other party will be declared null and void, either at law or in equity. Thus, if any advantage is taken of a man when drunk, or if he be brought into that situation by the contrivance or management of the person who obtains the contract, it is fraudulent, and equity will relieve: *White v. Cox*, 3 Hayw. (Tenn.) 79. A bond obtained from a person intoxicated by procurement of the obligee may be avoided at law: *Lacy v. Admr. of Garrard*, 2 Ohio, 7. If a person procures the intoxication of another for the purpose of securing an unconscionable advantage in a contract, the contract will be held void in an action to enforce it: *Willcox v. Jackson*, 51 Iowa, 208, 1 N. W. 513; but probably all that is meant by this and like decisions, is that when the intoxication was induced by the person who seeks to enforce the contract, he may be defeated by less evidence than if he had been guiltless. If there is such a contrivance or management, on the part of one party, to draw the other into drink, and thus take advantage of him and his intoxication, as is unconscionable, a court of equity will interfere on the ground of fraud, even when the intoxication is less than excessive: *Mansfield v. Watson*, 2 Iowa, 111. And a note obtained from an intoxicated person will not bind him where the intoxication is such as to deprive him of his reason, particularly where the drunkenness has been caused by the contrivance of the other party: *Newell v. Fisher*, 11 Smedes & M. 431, 49 Am. Dec. 66. A purchaser cannot call for the execution of a contract procured from a vendor while in a state of intoxication, which the vendee was instrumental in bringing about: *Whitesides v. Greenlee*, 2 Dev. Eq. 152. This is always true unless the deed was executed when the grantor was sober: *Woods' Lessee v. Pindall*, Wright (Ohio), 507. A deed made by a person while in a state of intoxication will be set aside if advantage has been taken of his condition, and his drunkenness was produced by the act or connivance of the person to be benefited: *O'Connor v. Rempt*, 29 N. J. Eq. 156. A note procured from a person while he was drunk, by the holder who had fraudulently and artfully got him drunk and imposed upon him while in that condition, cannot be enforced: *Curtis v. Hall*, 4 N. J.

L. 361. Notes and mortgages obtained, without consideration, from a person weak in mind and fond of liquor, by a designing and shrewd man whom he thought to be his friend, by plying him with liquor, playing on his fears and cajoling him, until in a state of intoxication and not realizing what he was doing, he signed the instruments, are void, both for lack of consideration, and for fraud, in the hands of the payees and subsequent holders, who are not bona fide holders and purchasers for value: *Knott v. Tidymen*, 86 Wis. 164, 56 N. W. 632.

V. Unfair Advantage Taken.

A contract made by a person while in a complete state of intoxication will be set aside, if advantage has been taken by the other party of his situation and condition: *Maxwell v. Pittenger*, 3 N. J. Eq. 156; *O'Connor v. Rempt*, 29 N. J. Eq. 156; *Prentice v. Achorn*, 2 Paige, 30. If one man takes advantage of another when the latter is in a state of intoxication to commit a fraud upon him, the former cannot enforce the contract and the latter is entitled to relief from such fraud: *Hall v. Moreman*, 3 McCord, 477; *Hotchkiss v. Fortson*, 7 Yerg. 67. If it appears that one of the parties to a contract was overreached while in such a mental condition from the use of alcoholic spirits as made him an easy victim, the settlement contracted for will not be conclusive upon the party so overreached: *Murray v. Carlin*, 67 Ill. 286. If a person is induced to sign a contract while in a state of intoxication to such a degree as not to know its true intent and meaning, such contract, it has been held, is not only voidable, but absolutely void: *Hunter v. Tolbard*, 47 W. Va. 258, 34 S. E. 737. And if when a man is so drunk as to render him an easy prey to the fraudulent designs of another, an unfair advantage is taken of his situation and condition to procure from him an unreasonable bargain, a court of equity will interfere and rescind the contract, not on the ground of his drunkenness, but of the fraud: *Calloway v. Witherspoon*, 5 Ired. Eq. 128.

VI. Knowledge of Other Party.

The knowledge on the part of one party that the other party is excessively drunk at the time of its execution, is another ground on which a contract so made may be avoided, at least if such knowledge does not render it absolutely void. Thus, equity will relieve against a conveyance made without consideration, and, when the grantor, through intoxication, was, to the grantee's knowledge, not himself: *Warnock v. Campbell*, 25 N. J. Eq. 485. The total drunkenness of the maker of a note when he executes it, if known to the payee, makes it void as to the latter: *State Bank v. McCoy*, 69 Pa. St. 204, 8 Am. Rep. 246. If the principal assigning partner is, at the time of the execution of an assignment, laboring under the immediate effects of intoxication well known to the assignee and the agent of the creditors procuring the assignment, the transaction will be set aside in equity: *Bruen v. Clark*, 1 Biss. 128. Or a deed without consideration, from

one whose mind has been greatly impaired by excessive and long-continued intemperance, to another from whom he has been in the habit of buying liquor, and who knew of his excess in the use of it, will be set aside: *Adams v. Ryerson*, 6 N. J. Eq. 328. If possession of personal property has been obtained by means of a contract made with one who, by reason of his intoxication, was without capacity to enter into a valid agreement, and the person obtaining the property knew of the other's incapacity when the contract was made, the transaction is fraudulent and may be rescinded and set aside: *Baird v. Howard*, 51 Ohio St. 57, 46 Am. St. Rep. 550, 36 N. E. 732, 22 L. R. A. 846. A transfer of shares in a corporation, procured from the owner while so intoxicated as to be incapable of transacting business by fraud, with a knowledge of his condition, and for a grossly inadequate consideration, will be set aside in equity, and if without any fault of his, he is unable to restore the consideration, provision for its repayment may be made in the final decree: *Thackrah v. Haas*, 119 U. S. 499.

VII. Ratification.

It is well established that a contract invalid and voidable by one of the parties by reason of his intoxication at the time of executing it, may be ratified by him when he becomes sober, and if so ratified it becomes binding upon him and will be enforced: *Strickland v. Parlin etc. Co.*, 118 Ga. 213, 44 S. E. 997; *Mansfield v. Watson*, 2 Iowa, 111; *Bush v. Breinig*, 113 Pa. St. 310, 57 Am. Rep. 469, 6 Atl. 86; *Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753. A contract for a valuable consideration cannot be avoided on the ground that a party to it was intoxicated at the time, if his assent was afterward given, when not disabled by intoxication or otherwise: *Arnold v. Hickman*, 6 Munf. 15. And it has been said that "if a man accustomed to strong drink, and even to be intoxicated every day, but notwithstanding possessed of reason, and the power of reflection, determines, with all the deliberation he is capable of, to sell his property, offers it repeatedly for sale, at length sells it at the best price he can obtain, to a man against whom there is no proof of his having taken advantage of the hour of intoxication, and if afterward he professes himself satisfied with the bargain, and assigns a good reason for it, when the bargain is clear, explicit, and certain, when it has been fully executed on the other side," the contract must be enforced: *Reinicker v. Smith*, 2 Har. & J. 421. The defense of intoxication should never be allowed to defeat a contract, where the subsequent conduct of the party pleading it is such as to have the appearance of his having confirmed the contract: *Williams v. Inabnet*, 1 Bail. 343. A deed made by a person while so drunk as would authorize him to repudiate it may be ratified by him when sober, so as to bind him and his personal representatives: *Eaton v. Perry*, 29 Mo. 96. If

the maker of a note and mortgage pleads that he was by reason of his intoxication incompetent to contract at the time the obligations were executed, but it is found that he was fully aware of the nature and effect of the contract when the money was received and disposed of by him, his incompetency at the time of entering into the contract does not absolve him from the obligation thereof: *Hawley v. Howell*, 60 Iowa, 79, 14 N. W. 199. Or if a person while in a state of intoxication is imposed upon and induced to enter into a disadvantageous contract, and after he becomes sober he ratifies it by giving a bond or deed in pursuance thereof, he is not entitled to any relief: *Moore v. Reed*, 2 Ired. Eq. 580. Although contracts voidable because entered into by a party when he was so intoxicated as not to know what he was doing, may be ratified by him when he becomes sober, yet such ratification must take place when he is fully sober in order to be valid and binding: *Reinskof v. Rogge*, 37 Ind. 207; *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271. Of course those cases which hold that a contract entered into when a person is so drunk as to render him incompetent to contract is absolutely void also hold that such contract is incapable of ratification: *Berkley v. Cannon*, 4 Rich. 136; *Newell v. Fisher*, 11 Smedes & M. 431, 49 Am. Dec. 66.

VIII. Rescission and Restoration.

If a person seeks to avoid his contract on the ground of his intoxication at the time of its execution, rendering him incapable of understanding what he was doing, he must elect to do so and act within a reasonable time: *Cummings v. Henry*, 10 Ind. 109; and he must not only show that he was incapacitated by his intoxication, but also that he rescinded the contract within a reasonable time after he became sober and placed the other party in statu quo, by returning the consideration paid: *Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 473, 57 Atl. 959. And if, for instance, he does not return the consideration received the instant he is restored to his senses, it may be rightfully presumed that he intends to confirm the contract; *Williams v. Inabnet*, 1 Bail. 343. If a person desires to avoid his contract on the ground of his drunkenness, he must first place his adversary in the identical situation in which he was before the contract was executed: *McGuire v. Callahan*, 19 Ind. 128. To defend against a contract on the ground of intoxication, it must have been rescinded by restoring whatever was received as the consideration thereof: *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377. Except perhaps if without any fault on the part of the party seeking to avoid the contract, he is unable to restore the consideration at once, provision for its repayment may be made in the final decree: *Thackrah v. Haas*, 119 U. S. 499.

IX. Implied Contracts.

With regard to contracts which it is sought to avoid on the ground of intoxication there is a distinction between express and implied contracts, and the defense that a contract was entered into while the defendant was intoxicated to such an extent as not to be conscious of what he was doing, will not avail him when the action is not upon the express contract or promise, but for the recovery, on the theory of an implied contract, of the consideration received by him: *Haneklaw v. Felchlin*, 57 Mo. App. 602. A person thus intoxicated is liable on an implied contract for necessities furnished him, whether such contract was made by himself or some one else acting in his behalf: *Devin v. Scott*, 34 Ind. 67; *Darby v. Cabanne* 1 Mo. App. 126; *Brockway v. Jewell*, 52 Ohio St. 187, 39 S. E. 470.

X. Bona Fide Holders for Value.

The defense of drunkenness of the maker of a note cannot be set up against an innocent holder for value as a drunken man is liable to an innocent third person for acts which he commits while in that condition and in this respect he differs from an insane person: *State Bank v. McCoy*, 69 Pa. St. 204, 8 Am. Rep. 246; *McSpanan v. Neeley*, 91 Pa. St. 17. A note in the hands of a bona fide holder for value cannot be avoided on the ground that the maker of the note at the time he executed it was so intoxicated that he did not know what he was doing: *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753. A note in the hands of a holder in good faith cannot be impeached on the ground of the drunkenness of the maker, if fair on its face, except upon proof of fraud and evidence of bad faith: *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306. In *Caulkins v. Fry*, 35 Conn. 170, it was held that if the maker of a note defends against a bona fide holder on the ground of his intoxication when he executed the note, he must make out a complete state of drunkenness and that if he was able to sign the note, and the next morning to remember that he had done so, and for what the note was given, he does not show such a state of complete intoxication as constitutes any defense. A guaranty obtained by fraud from an intoxicated person who is chargeable with negligence may be enforced against him by an innocent third person, who has acted to his prejudice upon the faith of such guaranty which was addressed to him: *Page v. Krekey*, 137 N. Y. 307, 33 Am. St. Rep. 731, 33 N. E. 311, 21 L. R. A. 409.

XI. Habitual Drunkenness.

In the absence of an inquisition finding a person to be a habitual drunkard, it is generally considered that the fact that one of the parties to a contract was addicted to habitual drunkenness will not invalidate the contract, when it is not shown that the other party took advantage of a moment of intoxication: *Keough v. Foreman*, 23 La. Ann. 1434; *Wright v. Fisher*, 65 Mich. 275, 8 Am. St. Rep. 886,

32 N. W. 605. Habitual drunkenness of the grantor in a deed not procured by the grantee therein, will not affect it, if executed when the grantor was sober: *Wood v. Lessee of Pindall, Wright* (Ohio), 507. A habitual drunkard is not ipso facto incompetent to execute a deed; he is simply incompetent upon proof that at the time his understanding was clouded, or his reason dethroned by actual intoxication or upon proof of general unsoundness of mind: *Van Wyck v. Brasher*, 81 N. Y. 260. A drinking man's contracts will not be set aside for alleged want of mental capacity from that cause alone, when insanity arising therefrom is not shown. If rational and competent to transact any kind of business at the time, his contract will be sustained: *Schramm v. O'Connor*, 98 Ill. 539. And the fact that a person may have been in the habit of drinking will not relieve him from a contract entered into when not intoxicated. In order to defeat the contract on the ground of habitual intoxication, it must appear that the party was in such a condition that he was incapable of understanding the nature of the transaction in which he was engaged: *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613. But one reduced to such extreme debility by habitual intoxication as to be unable to rise or sit up in bed unless supported, and to hold a pen or make a mark unless the pen and hand are held for him, can no more execute a conveyance of his property than if actually intoxicated at the time: *Wilson v. Bigger*, 7 Watts & S. 111. And to the same effect, *Franks v. Jones*, 39 Kan. 236, 17 Pac. 663. If a person was so drunk, or so imbecile from long habits of drunkenness, when he signed a note, as not to know what he was about, or not to understand the nature of a contract or not to have any correct appreciation of the business in which it was given, the note cannot be enforced: *McClure v. Mansell*, 4 Brewst. (Pa.) 129. If a note is taken from a person of weak intellect and a habitual drunkard, under suspicious circumstances, it is a strong badge of fraud, and will not be enforced unless the holder makes out a fair case and good consideration: *Hale v. Brown*, 11 Ala. 87. A person will be protected against his own acts while in a state of insanity even if brought about by his habitual drunkenness: *Menkins v. Lightner*, 18 Ill. 282. The whole doctrine of this particular branch of the law is well expressed in *Conant v. Jackson*, 16 Vt. 335, where it is held that although a person's mental faculties may be so far prostrated by long-continued habits of intoxication, as to render him for a considerable part of the time, incompetent to make a contract, yet contracts made by him at intervals when he appears sober and rational cannot be avoided on the ground of imbecility alone, unless they are so far unreasonable and unequal as to afford evidence that his appearance was deceptive, and his intellect in reality clouded and confused, and that an unfair advantage was taken of his condition. In the latter event equity will always afford relief by setting the contract aside.

If a habitual drunkard is cured of the liquor habit, under a contract to pay therefor, and then returns to his habits of drunkenness with the dishonest purpose of evading the contract, such act will avail him nothing and he will remain bound: *Fisk v. Townsend*, 7 Yerg. 146.

a. *After Inquisition.*—Generally speaking, one found by inquisition to be a habitual drunkard is thereby rendered incompetent, subsequently, to enter into a contract which will bind his estate: *Imhoff v. Witmer's Admr.*, 31 Pa. St. 243; *Tozer v. Saturlee*, 3 Grant's Cas. 162. After the actual finding of an inquisition declaring a drunkard incompetent to manage his estate, all his gifts, acts, and contracts, until he is permitted to resume control of his property, are utterly void: *L'Amoureux v. Crosby*, 2 Paige, 422, 22 Am. Dec. 655. The contracts of a habitual drunkard, made after inquisition found, and before its confirmation, are void: *Clark v. Caldwell*, 6 Watts, 139. But in the *Matter of McGarvey*, 64 How. Pr. 135, it was held that, in such case, and if between those dates, the drunkard, who seemed to have capacity for business and attended to some of his affairs, contracted a debt with one who had no knowledge of the pendency of the proceedings, the debt was recoverable. And a strange decision is that made in *Sill v. M'Knight*, 7 Watts & S. 244, that a person found by inquisition to be a habitual drunkard is not thereby deprived of his power to perform the office of executor or administrator. This, because an inquisition, by which a person is found to be of unsound mind and incapacity and not able to conduct his own affairs, in consequence of his habitual drunkenness, is conclusive evidence of the incapacity of such person to contract in any manner until such incapacity is removed: *Devin v. Scott*, 34 Ind. 67; *Wadsworth v. Sherman*, 14 Barb. 169; *Klohs v. Klohs*, 61 Pa. St. 245. The inquisition is only presumptive and not conclusive evidence of incapacity as to the acts of the habitual drunkard performed before the issuing of the commission and overreached by it: *L'Amoureux v. Crosby*, 2 Paige, 422, 22 Am. Dec. 655; *Tozer v. Saturlee*, 3 Grant's Cas. 162. An inquisition finding a person to be a habitual drunkard is *prima facie* evidence of incompetency at any time covered by the finding, and the burden is upon the person setting up the contract of such drunkard to show that he had capacity at the time of its execution, and in such case it must be shown that such drunkard had memory and judgment enough to understand the character of the act, and the legal responsibility entailed thereby: *Noel v. Karper*, 53 Pa. St. 97; *Klohs v. Klohs*, 61 Pa. St. 245. If it is shown that prior to the inquisition declaring a person to be a habitual drunkard and incompetent to contract, he executed a note when fully comprehending what he was doing and when he was sober, and that no fraud or deception was committed upon him, the note may be enforced: *Donehoo's Appeal*, 2 Monaghan (Pa.), 213.

RAYBURN v. PENNSYLVANIA CASUALTY COMPANY.

[138 N. C. 379, 50 S. E. 762.]

INSURANCE, ACCIDENT—Waiver of Conditions.—A provision in an accident insurance policy in relation to the payment of premium is waived by the delivery of the policy by an authorized agent with full knowledge of the fact that the insured had been injured subsequently to the date of the application for insurance, and the receipt and retention of the premium at the time of the delivery of the policy. (p. 549.)

INSURANCE, ACCIDENT—Time of Taking Effect.—An accident insurance policy takes effect from its date, unless it is otherwise stated that it shall take effect only upon certain stated conditions, and if such conditions are met, and the policy delivered, it takes effect as of the day of its date. (p. 549.)

INSURANCE, ACCIDENT—Effect of Delivery of Policy.—In the absence of fraud the delivery of an accident insurance policy is conclusive proof that the contract is completed, and an acknowledgment that the premium was properly paid during good health. (p. 549.)

INSURANCE, ACCIDENT—Effect of Issuance of Policy.—If accident insurance is applied for and a policy subsequently issues and is delivered, it is based on the status of the insured at the time of the application for insurance, and the insurer assumes the risk after the date of the policy. (p. 550.)

INSURANCE, ACCIDENT—Construction of Contract.—If a contract of accident insurance is reasonably susceptible of two constructions, that must be adopted which is most favorable to the insured. (p. 550.)

McBrayer & McBrayer, for the plaintiff.

Gallert & Carson, for the defendant.

³⁸⁰ BROWN, J. The motion of the defendant to amend the transcript of appeal by inserting the amended answer is allowed, and the appeal has been considered and determined by us with the amended answer in.

The action is brought to recover upon an accident policy issued by the defendant to the plaintiff and dated October 23, 1901. The plaintiff was injured on October 27, 1901.

The plaintiff testified that he made due application in usual form through Mills, the defendant's agent, for the policy on October 21, 1901, and at that time offered to pay the premium. Mills refused the money and said that was not the time and that the plaintiff could pay the premium when he (Mills) brought him the policy. The agent delivered the policy to the plaintiff on October 30, 1901, and

then received the premium. At the time he delivered the policy, Mills said to the plaintiff that "he understood I was already hurt in the arm and shoulder, and that although being hurt he would deliver the policy." The plaintiff made claim in due form and in apt time, and received from the home office at Scranton, Pennsylvania, the necessary blanks for making proof, dated January 2, 1902. The plaintiff's notice of injury, sent to the defendant, states he was hurt on October 27, 1901. Again on February 25, 1902, the defendant's manager at Charlotte, North Carolina, sent another set of proofs to the plaintiff to be executed.

The policy recites that it is issued in consideration of an annual payment of a premium of ten dollars, and states that "this insurance is for the term of one year beginning at ³⁸¹ noon on the twenty-third day of October, 1901, and ending on the twenty-third day of October, 1902." The policy contains a provision that it shall not be valid until countersigned by the agent at Charlotte. This was done on October 23, 1901. It is further declared that it shall not take effect unless the premium is actually paid previous to any accident under which claim is made.

It is contended by the plaintiff that the evidence tends to prove a waiver of this latter provision and that the case should have been submitted to the jury upon a proper issue with appropriate instructions. In this view we concur.

The general rule is well settled that the policy takes effect from its date, unless it be otherwise stated that it shall only take effect upon certain conditions. It is also held that upon such conditions being met, if the policy is delivered, it takes effect as of the day of its date: May on Insurance, sec. 400.

The delivery of the policy in this case was made by the defendant's authorized agent with full knowledge of all the facts. He received the premium and it has been retained by the defendant. There is no suggestion, much less evidence, of fraud or imposition. On the contrary, the delivery was the voluntary act of the defendant's agent, without even an importunity upon the part of the plaintiff. It has been held in a recent case in this court that where the policy is delivered, there being no allegation or proof of fraud, the delivery is conclusive proof that the contract is completed and is an acknowledgment that the premium

was properly paid during good health: *Grier v. Mutual Life Ins. Co.*, 132 N. C. 542, 44 S. E. 28; *Kendrick v. Mutual etc. Ins. Co.*, 124 N. C. 315, 70 Am. St. Rep. 592, 32 S. E. 728.

The further principle is applicable to this case, that where insurance is applied for and afterward a policy is issued and delivered, it is based on the status of the insured at the time of the application, and the company assumes the risk after the date of the policy: *Grier v. Mutual Life Ins. Co.*, 132 N. C. 542, 44 S. E. 28.

³⁸² We are not inadvertent to *Ormond v. Fidelity Life Assn.*, 96 N. C. 159, 1 S. E. 796, or *Whitley v. Piedmont etc. Life Ins. Co.*, 71 N. C. 481, so earnestly pressed on our attention by Mr. Gallert in his well-considered argument. The syllabus in each case fails to show that the policy was delivered by the agent with full knowledge of the facts. A careful reading of the facts and the opinions leads us to conclude that those cases are not in conflict with the conclusions we have reached in this. It must also be remembered that this contract does not terminate because one injury is inflicted. It is a continuing contract and the duration of its binding force, as explicitly stated in it, continued until noon October 23, 1902. The construction contended for by the defendant that the contract began on October 30, 1901, when the policy was delivered, is inconsistent with a contract for twelve months and which by its own express limitation expires October 23, 1902.

If a contract of insurance is reasonably susceptible of two constructions, the uniform rule in all courts is to adopt that which is most favorable to the insured: *National Bank v. Insurance Co.*, 95 U. S. 673.

Upon the evidence presented in this record, if believed, the plaintiff was entitled to a verdict in accordance with the terms of the contract, and the court below erred in giving judgment of nonsuit.

New trial.

A Contract of Insurance may exist without either the payment of the premium or the delivery of the policy: *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423. As to the necessity of a delivery of the policy to the insured before the contract becomes effective, see *Robinson v. United States Ben. Soc.*, 132 Mich. 695, 102 Am. St. Rep. 436; *Triple Link etc. Assn. v. Williams*, 121 Ala. 138, 77 Am. St. Rep. 34; note to *New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 146-149; and as to the necessity of a payment of the premium,

see the note to *New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 150, 151; *Tomsecek v. Travelers' Ins. Co.*, 113 Wis. 114, 90 Am. St. Rep. 846. As to the effect of a recital of payment in the policy, see *Union Life Ins. Co. v. Parker*, 103 Am. St. Rep. 714; *Kendrick v. Life Ins. Co.*, 124 N. C. 315, 70 Am. St. Rep. 592; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233.

KERR v. GIRDWOOD.

[138 N. C. 473, 50 S. E. 852.]

WILLS—Holographs.—A provision in a holographic will that the testatrix wished to regard the desire of her husband as expressed in his last illness, that at her death he wished certain property to be sold and the proceeds divided between his sisters and brothers, is a valid testamentary disposition of such property. (p. 552.)

WILLS—Construction.—No Particular Form of Words or expressions is necessary to constitute a legal disposition of property, and although apt legal words are not used, and the language is inartificial, courts will give effect to it, when the intent of the testator is apparent. (p. 553.)

F. A. Sondley and Merrick & Barnard, for the plaintiffs.

Merrimon & Merrimon, for the defendants.

⁴⁷³ BROWN, J. Mrs. Laura A. Girdwood died during 1904, leaving a last will and testament executed by her as a holograph will and dated December 26, 1903. The correctness of the judgment appealed from depends upon the efficacy of a certain clause in said will, as a testamentary disposition of the property named in it, which clause is as follows:

“I wish to record the wishes of my darling husband as expressed to me in his last illness. He felt that he had left me well provided for, and was so thankful to think so, and wanted me to have exclusive use of all property, and everything so long as I live. At my death he wished the two ⁴⁷⁴ laundry properties to be sold, or disposed of to the best advantage, and the proceeds of the sale to be equally divided between his sister (if living) and his brothers, who are living. He wished me to do just as I pleased with my home place, and personal property, and I hereby express my wishes.”

The testatrix then proceeded to dispose of her said home place and to give sundry legacies, but left undisposed of a lot

in the city of Asheville on Bailey street, which descended to her sister, Bethel Clayton, as her heir, and a lot on Penland street, and also left undisposed of personal property and money. The testatrix, besides other dispositions, made provision for her mother, Mrs. Salena Roberts, and her sister, Mrs. Bethel Clayton.

The only question presented on this appeal relates to the legal effect of the language above quoted employed by the testatrix in what is undeniably a testamentary document.

Are these words testamentary in character, or merely a recital of an occurrence which had taken place between her and her husband? After carefully considering the entire will, in the light of the authorities we have concluded that it was the intention of the testatrix in employing these words that they should have a testamentary effect, and that the language employed by her is of such legal efficacy that the law can give force to it and execute her intention.

It cannot be doubted that the testatrix thought she was making her will. The paper is testamentary in form and has been duly admitted to probate. The consciousness of her act and its solemnity and importance are disclosed in the closing words used by the testatrix, to wit, "Written when I am as well as I ever am, and my mind as clear." In this document she disposes of a great deal of her property and makes devises and bequests of real and personal property to these appellants and many others besides. Why should she have incorporated these words expressing her husband's ⁴⁷⁵ wishes in her own will, unless she intended to give effect to them. They related to a most important and valuable part of the estate her husband had given to her at his death. To have recited his wishes, that these particular properties should go to her husband's own near relatives, and then to deliberately withhold the necessary purpose and intent to effectuate his wishes, is not at all consistent with the evident love and affection the testatrix felt for her husband's memory. The closing words of the will indicate that the testatrix was conscious that she was executing an instrument which might be contested, and that the language employed in it would be closely scrutinized.

The words she used point out unmistakably the particular property she intended to devise, and also indicate unerringly the persons to whom such property shall go. In reciting her husband's wishes, she evidently intended then to carry them

out and to indicate that they were in accord with her own. She made no subsequent disposition of these properties to other persons, and did not again refer to them in her will. It is almost inconceivable that she intended to die intestate as to them.

It is not only a cardinal principle in the construction of wills to give full effect to the intent of the testator, but also to so construe the instrument as to give force and effect to every part of it, if possible. No part of such an instrument will be discarded unless in conflict with some other part, and then that part will be enforced which expresses the intention of the testator. This is done, *ut res magis valeat quam pereat*; for the law to do otherwise would be to defeat the very thing which it undertook to enforce.

There is nothing in the entire will inconsistent with the purpose to give the laundry properties in accordance with her husband's wishes. To refuse to give them effect would be at variance with her plain intent. No particular form of expression is necessary to constitute a legal disposition of ⁴⁷⁶ property: Underhill on Wills, secs. 37-43; Schouler on Wills, secs. 262, 263; *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15. Although apt legal words are not used, and the language is inartificial, the courts will give effect to it where the intent is as apparent as that of the testatrix in this will. Form will be discarded, and has been, so that an instrument in form a deed has been held to be a will: *Henry v. Ballard*, 4 N. C. 397; *In re Belcher*, 66 N. C. 51, 54. We think the court below properly interpreted the will, and the judgment is affirmed.

Instruments Which May be Considered as Wills or as testamentary in character are discussed in the monographic note to *Ferris v. Neville*, 89 Am. St. Rep. 486-500.

Holographic Wills are discussed in the recent monographic note to *Estate of Fay*, 104 Am. St. Rep. 22-34. A letter may constitute a valid holographic will: *Buffington v. Thomas*, 84 Miss. 157, 105 Am. St. Rep. 423.

BROWN v. ASHEVILLE ELECTRIC COMPANY.

[138 N. C. 533, 51 S. E. 62.]

EMINENT DOMAIN—Municipalities.—The legislature cannot empower corporations to appropriate private property without compensation, nor can it authorize a city to do so. (p. 556.)

MUNICIPAL CORPORATIONS—Streets and Sidewalks—Abutting Owners—Additional Servitude.—The right acquired by a city by condemnation of a street and sidewalk is confined to the public necessity and to uses for which property is taken or burdened with the easement, and for any additional burden placed upon the servient tenement, compensation must be made. (p. 557.)

MUNICIPAL CORPORATIONS—Streets—Rights of Abutting Owners—Additional Servitude.—The power of a city to confer a franchise to lay tracks, erect poles, and string wires along the streets or sidewalks of the city cannot affect the right of abutting owners to demand compensation for any additional burden thereby imposed upon their property. (p. 559.)

MUNICIPAL CORPORATIONS—Streets—Poles and Wires—Additional Servitude.—Planting telephone or telegraph poles and stringing wires upon a public street, the fee of which is in the abutting owner, is an appropriation of private property, and an imposition of an additional servitude for which such owner may claim and recover compensation. (p. 560.)

MUNICIPAL CORPORATIONS—Streets.—Shade Trees growing and standing upon the sidewalk of a public street are the property of abutting owners, and cannot be removed without their consent, except when their removal is necessary for the use of the street as a public highway. (p. 562.)

MUNICIPAL CORPORATIONS—Streets—Removal of Shade Trees—Damages.—If an electric company, in order to more conveniently place its poles and string its wires, removes a shade tree standing on the sidewalk of premises abutting on the street without the consent and against the protest of the abutting owner, its act is willfully wrong and wanton, and such owner is entitled to recover exemplary and punitive damages. (p. 563.)

F. Carter and H. C. Chedester, for the plaintiffs.

J. C. Martin and F. A. Sondley, for the defendants.

534 CONNOR, J. For the purpose of disposing of the questions presented upon this record, we may take certain propositions as settled. The land over which are the street and sidewalk upon which plaintiffs reside was the property of the grantor of the plaintiffs. By condemnation proceedings duly had, the city of Asheville acquired an easement over said land for the purpose of enabling it to open and maintain a public street and sidewalk for the use of the citizens of Asheville. That the fee to said land remained in the owner and

was granted to plaintiffs, together with the lot, to the outer edge of the sidewalk. The tree, cut down by the defendants, stood upon the sidewalk on the outer edge and was not a nuisance to or interference with the public use of the sidewalk. That the city by its charter and amendments thereto had control of the street and sidewalk with all of the powers in regard to ⁵³⁵ the use thereof, and of removing obstructions therefrom necessary and convenient to that end. That such powers included the right to cut down and remove this or any other tree on the street or sidewalk which, in the judgment of the city authorities, was a nuisance to or an obstruction of the public in the use of the street and sidewalk. That said tree afforded shade to the premises and residence of plaintiffs, and its removal depreciated the value of plaintiffs' property to the extent of four hundred and ninety-nine dollars as found by the jury. In view of his honor's instruction to the jury we must assume that the jury found, and we find ample reason to justify such finding, that the defendant electric light company, with the permission of the superintendent of streets of the city of Asheville, afterward approved by the board of aldermen, removed the tree for the purpose of more conveniently erecting its poles and stringing its electric wires along the street. His honor thus stated the contention on the part of the defendants: "The defendants contend that they had the right to cut down this tree, on account of the fact that the land was condemned for a street, that they had the right to cut it down for any purpose, and especially that they had the right to cut it down for the purpose of allowing electric light wires to pass there which they say was for the benefit of the public. The court charges you that if that was the purpose, and the city allowed the corporations that ran the electric light wires and the railroad company to do so more conveniently, then it would be your duty to answer the first issue 'Yes.' The city would not have the right, as the court views the matter, to cut down that tree for the purpose of appropriating that part of the land for the use of the defendants, unless the condemnation was for the purpose of the city, and they would not have the right to go there and cut down the tree unless they were going to use it for the purpose for which it was condemned." Before discussing the exceptions which challenge the correctness of this and other instructions involving the same principle, ⁵³⁶ it is proper to say that by an amendment to the charter of the city made subse-

quent to the condemnation of the land for a street and sidewalk, the city authorities were given power to permit the erection of telegraph, electric light poles and wires, etc., on and over the public streets of said city. This power, of course, in no manner affects the rights of abutting owners. The legislature could not have intended, because it had no authority to confer such power to be exercised in violation of such private rights. It simply empowered the aldermen to grant the franchise over the streets of the city, subject of course to the rights of the citizen in respect to his private property. The legislature had no power itself to empower corporations to appropriate private property without compensation, and of course could not authorize the city to do so: *Chesapeake etc. Tel. Co. v. McKenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690. There are a large number of exceptions to his honor's charge, both in respect to instructions given and refused. We do not deem it necessary to pass upon all of them, because in our view of the case, assuming the facts to be as contended by defendants, we find no error in the record. Conceding to the city of Asheville the largest possible powers in respect to the opening and controlling its public streets, they must all be construed and exercised within the well-defined limitation that they are held and to be used as a public trust for the benefit of the citizens of Asheville, and not for the convenience, or even the necessities of private persons or corporations. In speaking of the exercise of this power, the New York court says: "But we think it cannot, under guise of exercising this power, appropriate a part of the street to the exclusive, or practically to the exclusive, use of a railroad company, so as to cut off abutting owners from the use of any part of the street without making compensation for the injury sustained": *Reining v. New York etc. R. R. Co.*, 128 N. Y. 168, 28 N. E. 640, 14 L. R. A. 133.

As the question is one of much practical importance to the
537 people of the state, we will endeavor to mark the line which limits the power of municipal and quasi public corporations, or private corporations engaged in public service in interfering with the rights of abutting owners upon streets and highways. This court has, in *Tate v. Greensboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671, defined the power which the duly constituted city authorities have in opening, widening, using and controlling public streets. That this power, when exercised for the purpose and objects for which

it is granted and in good faith, is not subject to the supervision of the courts, is well decided in that case. We have no disposition to bring that decision, or anything said therein, into question. We adopt what is said by Mr. Justice Burwell as stating the principle upon which our decision is based. "It is not to be denied that the abutting proprietor has rights as an individual in the street in his front as contradistinguished from his rights therein as a member of the corporation or one of the public. The trees standing in the street along the sidewalk are, in a restricted sense, his trees. If they are cut or injured by an individual who has no authority from the city to cut or remove them, he may recover damages of such individual. His property in them is such that the law will protect it from the act of such wrongdoer and trespasser." Where it is said, "who has no authority from the city," it is meant no lawful authority, because, as we shall see, the city has no power to confer authority except in the manner and for the purpose for which it may do the act itself. Many of the decisions discussing the right of abutting owners upon streets and highways make a distinction between owners holding the fee in the land and those who have only such rights as accrue from their location on the side of the street. It is conceded that the fee to the land upon which the sidewalk is located, and the abutting lot, is in the plaintiff; we shall discuss the case from that view. The condemnation for a street and sidewalk, therefore, gave to the city an easement, the limit and extent of which, ⁵³⁸ both in respect to the use and the time of its enjoyment, is measured by the public necessity. "Where an easement only is taken for a public highway, the public acquires a paramount right to use and improve the land taken for highway purposes, which includes not only the right of passage, but such other incidental uses as have been immemorially accustomed to be made of public highways, such as the laying of sewers, gas and water pipes and the like": 2 Lewis on Eminent Domain, sec. 589; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224. This court has uniformly held that the right acquired by condemnation is confined to the public necessity and to the uses for which property is taken or burdened with the easement; that for any additional burden placed upon the servient tenement, compensation must be made: *Story v. New York El. R. R.*, 90 N. Y. 122, 43 Am. Rep. 146; *White v. Northwestern etc. R. R. Co.*, 113 N. C. 610, 37 Am. St. Rep. 639, 18 S. E. 330, 22 L. R.

A. 627; *Phillips v. Postal Tel. Co.*, 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022; *Hodges v. Western Union Tel. Co.*, 133 N. C. 225, 45 S. E. 572. Such conflict as may be found in the decisions arises out of the application of the principle. It is uniformly held that an easement acquired for one purpose, either by grant, dedication or condemnation, cannot be appropriated to another purpose. "It is certainly well settled that where a grant is made or trust created for a specific and defined purpose, the subject of the grant or trust cannot be used for another purpose without the consent of the party from whom it was derived, or for whose benefit it was created. We are not considering the right of the corporation to part with whatever interest it possessed under the dedication and trust, but the power of the corporation under the legislature to deprive the owner of a lot fronting on land so dedicated. . . . It cannot be successfully contended either that the dedication of land for a highway gives to the public an unlimited use, or that the legislature have the power to encroach upon the reserved rights of the owner, by materially enlarging or changing the nature of the public easement": *Story v. New York El. R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146.

539 In respect to an easement acquired by condemnation the reason is obvious; in assessing compensation the commissioners are restricted to such damages as are incident to the specific use for which the condemnation is made. While the city authorities had ample power to confer upon the defendants a franchise to lay their tracks, erect their poles and string their wires along the streets or sidewalks, if such franchise did not materially restrict or interfere with the public use for which it was held in trust, such power could not affect the right of abutting owners to demand compensation for any additional burden imposed upon their property. The fact that the defendant corporation was operating a public utility does not affect the question. The only difference being that if the city conferred the privilege upon a private citizen or corporation operating a private business, and its enjoyment interfered with the right of an abutting owner, no right to continue the use of the privilege could be acquired except by grant; whereas, if the person or corporation is conducting a business concerning the public—one conferring the right of eminent domain—the right to use the franchise or privilege may be acquired by condemnation, and paying the abutting owner compensation for the additional burden. The doc-

trine is well stated in *Reining v. New York etc. R. R. Co.*, 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133. "It is quite probable that the general interests of B and of the larger public are promoted by this appropriation of the streets, but it by no means follows that a lot owner whose property is injured should bear the loss for the public benefit. . . . The power conferred by the charter of B upon the common council to permit the track of a railroad to be laid in, along or across any street or public ground must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded." In the same case, Gray, J., concurring, said: "Here the object was to subserve the railroad use, and the appropriation of this embankment is practically exclusive. The street was subjected ⁵⁴⁰ to a new use, with consequences as direct, in the permanent deprivation of the abutting property owner's appurtenant easement, as though the railroad was operated in front of his premises upon a structure physically incapable of other uses." In *Eels v. American etc. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640, Peckham, J., says: "We think neither the state nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous and exclusive use by setting up poles therein, although the purpose for which they are to be applied is to string wires thereon and thus transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation, but the constitution provides that private property shall not be taken for public use without compensation to the owner. Where land is dedicated or taken for a public highway, the question is, What are the uses implied in such dedication or taking? Primarily, there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner, and he retains the ownership of the land, subject only to the public easement." To impose any different or additional burden without compensation cannot be done by the legislature either directly or by granting the power to a city. We cannot assume that it was intended to do so. Such intent is not to be gathered from the statute: *White v. Northwestern etc. R. R. Co.*, 113 N. C. 610, 37 Am. St. Rep. 639, 18 S. E. 330, 22 L. R. A. 627. The question is exhaustively discussed in *Story v. New York El. R. R.*, 90 N. Y. 122, 43 Am. Rep. 146. There is some conflict

of judicial opinion in respect to what constitutes an additional burden. The supreme court of Maryland in *Chesapeake etc. Tel. Co. v. McKenzie*, 74 Md. 36 (47), 28 Am. St. Rep. 219, 21 Atl. 690, says: "And so the condemnation of private property for a highway subjects the land so taken merely to an easement in favor of the public, and does not divest the owner of the fee. Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property and unlawful ⁵⁴¹ unless the right to do so is acquired by contract or condemnation." After discussing the rights of the public in the street, the court proceeds to say: "Subject to these and other like rights in the municipality and the public to the use of the street for street purposes, the owner of the fee in the bed of the street possesses the same right to demand compensation, for additional servitudes placed thereon, that the owner of the bed of a highway in the country is entitled to. If, then, the fee of the bed of the street be in the appellee, the planting of the pole was an additional servitude imposed upon her land for which she could claim compensation, and the act of the assembly could not deprive her of it." In *Broome v. New York etc. Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851, 2 Am. Elec. Cas. 259, the chancellor says: "In order to justify the defendants in setting up the poles, it is necessary for them to show that they have acquired the right to do so, either by consent or condemnation, from the owner of the soil. The designation by the city or town authorities of the streets where the poles may be set up is not enough." The same view is held in *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453, 1 Am. Elec. Cas. 565. That was an action of trespass, as the one before us. It appeared that in addition to putting the poles upon the highway, in which plaintiff owned the fee, the employes of the company "cut away the hedge because it was in their way, and they also cut down two hedge trees." The court said: "The position taken by the defendant is that the state can rightfully, as it has done, authorize the county board to permit defendant to construct its line of telegraph upon the highway without consent of the abutting land owner; that it imposes no new or additional burden thereon, and that when the public acquire an easement over land, for a compensation fully made, the public obtain all the rights the land owner had, and the state may authorize any usage of it not inconsistent with its use as a highway." After

stating the contention of the land owner, the court says: "The latter position is the one ⁵⁴² best sustained by authority, and rests on sounder principles. . . . The principle is, neither the state nor a municipal corporation has any rightful authority, under the constitution, to grant away the private property of the citizen, and if corporations quasi public, in the exercise of the right of eminent domain with which they are clothed by the sovereign power of the state, seek to appropriate it so that they may have a benefit therefrom, every principle of justice demands that they should make just compensation whether the property taken is of little or great value. But aside from all considerations of right and justice, the constitution has so declared, and its mandate in that respect may not be disregarded": Indianapolis etc. R. R. Co. v. Hartley, 67 Ill. 439, 16 Am. Rep. 624; Wills v. Erie etc. Co., 37 Minn. 347, 34 N. W. 337; Stowers v. Postal Tel. Co. (Miss.), 3 Am. Elec. Cas. 855; Joyce on Electric Law, sec. 321. That shade trees may not be removed except when necessary for the use of the street to the public is well settled: Lewis on Eminent Domain, sec. 132. There are some authorities to the contrary, but we think the view taken by those cited the sound one. We have no hesitation in holding that assuming that the board of aldermen of the city of Asheville had met and formally granted to the defendants authority to remove the tree, finding that its removal was necessary to put up its poles and wires either for the electric light or street railway, upon and along the sidewalk, such action would not have justified the act of defendants. It was not within the power of the city to deprive the plaintiff of his property for such purpose without compensation. We find, however, no averment or evidence that it was necessary to remove the tree. It is suggested that it was more convenient to place the poles and string the wires with the tree out of the way. This falls far short of the essential conditions upon which private property may be taken, or burdens imposed upon it. The right of eminent domain has been so freely conferred upon corporations, upon the mere suggestion that ⁵⁴³ their business is in some way connected with service to the public that we are in danger of forgetting that it is one of the most delicate and dangerous powers conferred by the people upon their government. Public franchises have been so generously and lavishly conferred and so freely used without compensation, that those who wish to enjoy them forget that one of the

chief ends for which government is created and taxes paid is the protection of private property—and then only with compensation. The record in this case shows that a valuable right of property affecting the comfort, health and welfare of the citizen and his family has been taken upon the suggestion of a private corporation to the superintendent of streets, without inquiry by the board of aldermen, notice to the plaintiff or any opportunity to be heard in defense of his rights. No person shall be deprived of his property except by the law of the land, or due process of law—which has been defined to mean the right to be heard—before he or his property is condemned. This sacred right is binding upon every department of the government and all of its agencies, including municipal and private corporations.

While it is held in *Tate v. Greensboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671, that the power to remove shade trees, where their removal is necessary for the use of the street as a public highway, may be conferred upon the street committee, it would be more in accordance with due and orderly procedure to do so only after due notice to the owner and a hearing before the legislative body of the city. The tree was cut on March 21, 1901. This action was brought on July 5, 1901. On September 16, 1904, the board of aldermen adopted a resolution reciting that the action of three corporations named “or one or more of them in cutting down and removing the tree in front of the place then owned and occupied by B. C. Brown, etc., some years ago in putting a line of street railway and appurtenances upon said street in front of said property, or replacing thereon certain light wires be and is hereby ratified ⁵⁴⁴ and confirmed, said tree having been so cut and removed by direction of the proper authorities of the said city.” It is evident that at the time of the passage of this resolution, the board were not certain to what corporation the power was given to cut the tree, or for what purpose it was conferred. It is not suggested in the resolution that it was necessary to remove the tree—or that it interfered with the street railway or the light wires. Indeed, it is apparent that the board knew but little about the matter which they “ratified and confirmed.” We have discussed the case upon the assumption that the tree was on the sidewalk. The testimony shows that while the condemnation took place in 1892, the land had never been used as a sidewalk. The plaintiff testified, without contradiction, that he had, at the

time the tree was cut, lived at the place six years, and "there had never been any sidewalk there." The tree was removed in March, 1901, and the hole out of which it was taken "about ten feet square," was open at the time of the trial. The testimony further shows that the tree was cut by the superintendent of the defendant companies, while Mr. Brown was away from home; that his wife phoned him, and he directed her to forbid the removal of the tree; the parties gave no heed to her request, and that in some way the wires connecting the phone were cut.

We are impressed with the wisdom of the words of Judge Peckham in concluding his opinion in *Eels v. American etc. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640. Referring to the argument that cases of this character should be decided with reference to the wants of an advancing civilization, which is doing so much to render life more comfortable and attractive, he says: "Let the defendants pay the owners for the value of the use it makes of the land outside and beyond the public easement in the highway and the necessity of the broader decision is done away with. It has the power to take the land upon making compensation, ⁵⁴⁵ and hence the refusal of the owner will not stop the proposed undertaking."

We have carefully examined the record and the exceptions to his honor's rulings. We find no error of which the defendant can complain. We are of the opinion that the allegations were sufficient to entitle the plaintiff to demand exemplary and punitive damages, and the testimony shows ample ground upon which to base the claim. In the entire transaction there was on the part of the defendants a painful disregard of the rights of the plaintiff. While extensive powers and wide discretion are given municipal authorities for the discharge of their duty to the public, it should always be borne in mind by those who serve in public positions that in our system of government there is no room or place for arbitrary power. The law which is a rule of action for the citizen is equally so for the official. Every man when his right of person or property is invaded has a right, and it is his duty to demand "quo warranto."

The judgment must be affirmed.

The Owner of Land Appropriated for a Highway retains his exclusive right in trees thereon for every purpose not inconsistent with the easement of passage; and for their injury or destruction, when they do not interfere with the rights of the public, he generally has

a remedy: See the monographic note to *Wright v. Austin*, 101 Am. St. Rep. 112. As to whether a telephone or railway company may remove or trim such trees to make way for their lines, and, if they can, whether they must make compensation therefor, see the authorities cited in the notes to *Wright v. Austin*, 101 Am. St. Rep. 113; *Mordhurst v. Ft. Wayne etc. Traction Co.*, 106 Am. St. Rep. 241. A municipality has no authority, as a rule, to declare shade trees in the streets a nuisance or remove them, unless they obstruct travel or cause some other injury: *Mayor of Frostburg v. Wineland*, 98 Md. 239, 103 Am. St. Rep. 399.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**LAND TITLE AND TRUST COMPANY v. NORTHWEST-
ERN NATIONAL BANK.**

[211 Pa. St. 211, 60 Atl. 723.]

BANKS AND BANKING—Forged Check—Liability.—The drawer of a check, draft, or bill of exchange, who delivers it to an impostor, supposing him to be the person whose name he has assumed, must, as against the drawee or bona fide holder, bear the loss where the impostor obtains payment of, or negotiates the paper, and the fact that the check was drawn by the trust department of a trust company on its own banking department, and payment refused by the latter for want of identification of the holder immediately after its issue is immaterial. (p. 565.)

J. G. Johnson, for the appellant.

S. Dickson, R. R. Vale, Alexander & Magill, and A. Moore, for the appellee.

²¹³ **BROWN, J.** This judgment cannot be disturbed unless we overrule Land Title and Trust Co. v. Northwestern Nat. Bank, 196 Pa. St. 230, 79 Am. St. Rep. 717, 46 Atl. 420, 50 L. R. A. 75. When the opinion in that case was delivered by our Brother Fell it expressed the view of the majority of the court, as then constituted, after a most careful consideration of the question involved; and it is approved by a majority of the court as now composed, who have also duly considered the question on what is really a reargument of it on this appeal. We do not feel called upon to say more of the opinion of Justice Fell, which, in a manner satisfactory to us, clearly expresses our views. In the note to the report of the case in 50 L. R. A. 75, there will be found numerous cases sustaining and vindicating it, the justified comment of the annotator ²¹⁴ being, "It is apparent from the foregoing cases that the drawer

of a check, draft or bill of exchange, who delivers it to an impostor, supposing him to be the person whose name he has assumed, must, as against the drawee or a bona fide holder, bear the loss where the imposter obtains payment of, or negotiates, the same."

The only fact not developed on the first trial, which was proved on the second, was that the check was taken to the banking department of the institution by the person to whom it had been delivered and payment demanded. The paying teller refused to pay it unless the person presenting it was identified, whereupon the latter said he would deposit it in his own bank. This was the person to whom the settlement clerk of the appellant had handed the check, intending to designate him as the payee, and the appellee, which had no knowledge of the teller's refusal to pay unless the holder of the check was identified, is not to be affected by such refusal, any more than if the check had been presented at another bank and payment had been refused for the same reason; for the banking department of the trust company must be regarded as separate and distinct from that which issued the check. It was what the appellant did at the time it handed the check to the impersonator of Bissey that stands in the way of its recovery from the appellee, which paid the check to the indorsee of the person to whom the appellant had issued it as its payee. It is not seriously argued that the refusal of the paying teller to pay without identification materially changes the situation.

The judgment is affirmed.

Dean and Potter, JJ., dissenting. We dissent from the judgment of the majority of the court in this case on the grounds set out in the dissenting opinion filed when the case was first before us.

For Authorities Bearing upon the Principal Case, see Land Title etc. Co. v. Northwestern Nat. Bank, 196 Pa. St. 230, 79 Am. St. Rep. 717; Burrows v. Western Union Tel. Co., 86 Minn. 499, 91 Am. St. Rep. 380; Heavey v. Commercial Nat. Bank, 27 Utah, 222, 101 Am. St. Rep. 966. The rights and remedies of the several parties when a forged check has been paid are discussed in the note to People's Bank v. Franklin Bank, 17 Am. St. Rep. 889-899. And the liability of one receiving payment of a check on a forged indorsement is discussed in the note to First Nat. Bank v. City Nat. Bank, 94 Am. St. Rep. 641-650.

SCHIGLIZZO v. DUNN.

[211 Pa. St. 253, 60 Atl. 724.]

MASTER AND SERVANT—Safe Place—Negligence—Vice-Principal.—The duty to provide a safe place to work and to maintain it in a reasonably safe condition by inspection and repair is a direct, personal, and absolute obligation from which nothing but performance can relieve an employer. The person to whom it is delegated becomes a vice-principal whose neglect is the neglect of the employer. (p. 567.)

MASTER AND SERVANT—Safe Place—Contributory Negligence.—If the evidence shows that a servant was injured while at work on a dangerous pile of stones, but had protested before that time to the master's superintendent against the dangerous condition of such place and refused to work there, and had been reprimanded by such superintendent, and ordered to go on with the work under a promise that the danger should be removed, it cannot be said as matter of law that the danger was so obviously imminent that the servant was guilty of contributory negligence in not absolutely refusing to go on with the work, and whether he was thus guilty under the circumstances is a question of fact for the jury. (p. 570.)

O. B. Dickinson and J. H. Hinkson, for the appellant.

W. R. Funefield and A. C. Wylie, for the appellees.

²⁵⁴ **MESTREZAT, J.** The learned trial judge in granting the nonsuit correctly said that "the difficulty in this case is not in ascertaining the rules of law, because they are well established, but it is the application of the rules." We will repeat, however, as applicable to the facts of this case, what is said in the very recent case of *Lillie v. American Car and Foundry Co.*, 209 Pa. St. 161, that, "The duty to provide a safe place to work and to maintain it in a reasonably safe condition by inspection and repair is a direct, personal and absolute obligation, from which nothing but performance can relieve an employer, and the person to whom it is delegated becomes a vice-principal whose neglect is the neglect of the employer."

The defendants' negligence should have been submitted to the jury. A sidetrack was used in delivering stone and other material for the construction of the wall. The stone was unloaded and piled in the narrow space between the main track of the railroad and the sidetrack. A car standing on the sidetrack was so close to the stone pile that a man could not pass between them. The wall was near the

sidetrack, and just beyond it was the derrick used in removing the stone from the car after it had been placed on the sidetrack. At the time the plaintiff was injured, the stone pile was from forty to sixty feet long, eight to ten feet wide and about thirteen feet high. The empty car was then standing on the sidetrack and was near ²⁵⁵ the stone pile. These were the conditions with which the defendants had surrounded the place at which they expected the plaintiff to perform the services for which he was employed. The evidence shows that the height of the stone pile, as well as its proximity to the car, made the place unsafe for the plaintiff to perform his duties. If the pile fell, when he was on it, his only means of escape, according to the testimony, was across the siding. The defendants are presumed to have known these facts and hence it was their duty, if they permitted these conditions to exist, to keep the sidetrack clear of empty cars, or of anything else that might endanger the plaintiff while engaged at his work on the stone pile. If in carrying out their contract to construct the wall of the elevated railway, the defendants erected and used any structure, or located the sidetrack or so used it or directed the stone to be piled so near it as to endanger the safety of their employes while in the discharge of their duties, it was the act of the defendants and they are responsible to an employé, without fault himself, for any injury he may sustain.

But aside from these considerations, Watson had full knowledge of the unsafe condition of the stone pile when he directed the plaintiff to go on it and select stones for the masons. It is true that the plaintiff did not tell him the pile was shaky, and this seems to have been the controlling reason of the court for holding that Watson was ignorant of its condition. The plaintiff's testimony, which for the purposes of this case must be taken to be true, shows what occurred between him and Watson immediately before the pile of stone fell. The plaintiff testified: "I saw the pile of stone was not very safe. Mr. Watson came and says, 'Why ain't you fellows working there?' The stonemason talked to Mr. Watson and he says, 'Why, we ain't got no stone.' So Mr. Watson came to me and says, 'What are you doing, Nick?' Kind of real sharp, 'Why don't you get stone for the stonemasons, Nick?' I says, 'Mr.

Watson, that pile of stone looks to me not very safe.' He says, 'The pile of stones is all right. Nick, go get another stone.' I says, 'If you want me to go on that pile of stones I want that car out of my way.' He says, 'Go on, Nick, go and get another stone, never mind the car. The engine will come and take that car out of your way.' I went on the stones. Mr. Watson gave me the order ²⁵⁶ to go on the pile and walked away." Two of the masons employed on the wall at the time of the accident, and called as witnesses, corroborated the plaintiff as to what occurred at the interview between him and Watson, and testified that the height of the stone pile made it unsafe and that the plaintiff wanted to move the car with a bar and that Watson told him to let it alone, "that the shifter would move it directly." They further testified that if the pile became dangerous, the only thing the plaintiff could do would be to jump toward the siding. Watson, therefore, was fully advised as to the dangerous condition of the stone pile, and observation should have disclosed to him the danger of permitting the car to stand on the track.

Nor do we agree with the learned trial judge that the facts of the case are such as to warrant him in holding the plaintiff guilty of contributory negligence as a matter of law. The learned judge's reasons for declaring the plaintiff guilty of negligence are stated by him as follows: "He [plaintiff] had knowledge, therefore, that the car was in his way in case he had to make his escape. He knew also that the pile was shaky. Yet with that knowledge, which was not conveyed to Mr. Watson at all, with a pile of stone sixty or sixty-five feet long, as he testified, and eight or ten feet wide, he selected the most dangerous part to go and look for the stone, without any orders to do so by Mr. Watson—he went in on that long pile just at the point where the car was standing, and with knowledge that the pile was shaky." The plaintiff's duties required him to go on and over the stone pile until he found a stone of the right dimensions for use of the mason who asked for and was to lay it. Before finding the proper stone, he might be compelled to walk over the entire pile. Nothing short of doing so would excuse him for not getting a stone for the masons engaged in the construction of the wall. As one of the witnesses testified the plaintiff had to go up

on the pile, or on the slant of it, wherever he could get a stone of the dimensions wanted. He, therefore, would not have been justified in confining his labors to any part of the pile in order that he might escape the dangers possibly attendant upon selecting a stone in another part of it. Hence, at the time he was injured, he was where the performance of his duties required him to be. The orders of ²⁵⁷ Watson did not command him to go to the safe part of the pile and select a stone, as the learned judge seems to think. On the contrary, they directed him to go to any part of the pile, including that in front of and near the car. Watson said: "Go on, Nick, go on and get another stone, never mind the car. The engine will come and take that car out of your way."

We do not think it can be held as a matter of law that the danger to the plaintiff was so obvious and imminent that he should have refused to obey the instructions of Mr. Watson and declined to perform the service. Watson assured the plaintiff the stone pile was all right and "that the shifter would move it [car] directly." From this language he had the right to infer that Watson would act promptly and have the car removed and relieve him from the danger of it being on the sidetrack. The plaintiff had been engaged on the stone pile for some time prior to the accident, and having so far escaped injury, he doubtless believed that by the exercise of extraordinary precaution he might be safe until the car was removed. It was, therefore, for the jury to determine whether under the facts disclosed by the evidence the danger was so evident and imminent that he should have refused to obey the orders of his employer and have declined to continue his work, or whether he was justified in relying upon the judgment of his employer as to the safety of the stone pile and the promise to remove the car.

The judgment of the court below is reversed and a *procedendo* is awarded.

It is the Duty of an Employer to furnish a reasonably safe place for his employes to perform the work for which they are engaged, and this duty he cannot escape by delegating its performance to others: See *Farrell v. Eastern Machinery Co.*, 77 Conn. 484, ante, p. 45; *Buehner v. Creamery etc. Mfg. Co.*, 124 Iowa, 445, 104 Am. St. Rep. 354; *Rogers v. Cleveland etc. Ry. Co.*, 211 Ill. 126, 103 Am. St. Rep.

185; monographic note to *Mast v. Kern*, 75 Am. St. Rep. 591-597. As to whether an employ  e is open to the charge of contributory negligence when he attempts to perform hazardous duties in obedience to the express orders of his employer, see the monographic note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 896-900.

ECKERT v. PENNSYLVANIA RAILROAD COMPANY.

[211 Pa. St. 267, 60 Atl. 781.]

RAILROADS as Carriers of Livestock—Negligence—Suitable Cars.—If a railroad company undertakes to transport livestock beyond its own line, it must not only carry it to the terminus of its own road, but also deliver it at that point to the connecting carrier in a car properly constructed and suitable for the purpose of transportation to the final destination. A failure to perform this duty is negligence which renders the carrier liable for resulting injury or loss. (pp. 571, 572.)

CARRIERS OF LIVESTOCK—Negligence—Suitable Cars.—If a carrier undertakes to transport livestock beyond his own line, the fact that a person employed by the shipper to accompany the stock is present when it is transferred to an unfit car at the terminus of the first carrier, and assists in making the change, does not relieve such carrier from the duty of furnishing a suitable car, nor from liability for injury or loss, resulting from a failure to do so. (p. 572.)

CARRIERS OF LIVESTOCK—Notice of Loss—Waiver.—A carrier may insert in its contract to transport livestock a provision requiring notice of a claim for damages within a stipulated time, but this provision is for the benefit of the carrier and may be waived by it, and will be deemed to have been waived, when the carrier has actual notice of the loss and attendant facts within the stipulated time, and does not raise any question as to want of notice until the time of the trial. (p. 574.)

CARRIERS OF LIVESTOCK—Negligence—Form of Action.—For negligence by a common carrier in transporting livestock intrusted to it, the shipper may, at his election, bring either an action ex contractu or an action ex delicto. (p. 574.)

COMMON CARRIERS cannot by Contract Limit Their Liability for their own negligence or that of their servants. (p. 574.)

C. G. Derr, for the appellant.

J. Snyder, for the appellees.

274 MESTREZAT, J. It was the duty of the defendant company not only to carry the plaintiffs' horses to the terminus of its road at Jersey City, but also to deliver them at that point to the connecting carrier in a car properly constructed and suitable for the purpose of transporting them to their final destination. The failure to perform this duty is

the basis of this action. The plaintiffs allege, and the jury has found, that the defendant company removed the horses from the Burton car at Jersey City and placed them in a car not arranged and fitted but utterly unsuitable for the safe carriage of the horses. This was a clear violation of the carrier's common-law duty, and the jury having found that this act of the defendant company resulted in the injury to the horses, the company's liability necessarily followed. The fact that the person employed by the shippers to accompany the stock was present when the horses were transferred to an unfit car and assisted in making the change, did not relieve the company from the duty to furnish a suitable car. This person's duty, as provided in the contract, required him to load and to unload the stock, to feed, water and care for it while in transit. He had no authority to select or furnish the car to which the ²⁷⁵ stock was to be transferred at Jersey City. That was the duty of the carrier. The shippers had complied with their contract "to inspect the body of the car or cars in which said stock is to be transported, and to satisfy himself that they are sufficient and safe, and in proper order and condition" when they selected and had the defendant company procure for them the Burton car in which they loaded the stock at Reading, and which admittedly was a safe and suitable car for carrying their horses. The company received the stock from the shippers in this car to be transported to its destination at Readville, a suburb of the city of Boston, Massachusetts. If subsequently the car en route became unsuitable for the purpose of shipping the horses, or for any other reason it had to be abandoned and the horses had to be transferred to another car, the selection and furnishing of a car suitable for transporting the stock to its destination devolved upon the carrier, and the failure to perform it would convict the company of negligence.

The defendant is not, under the facts of this case, in a position to insist upon the failure of the plaintiffs to deliver to it a verified written claim of their loss within five days from the time the horses were removed from the car at their destination. The horses were shipped from Reading, Pennsylvania, on Wednesday, June 11, 1902, and arrived at the freight station of the connecting carrier at Readville, their destination, about 7:30 o'clock on Saturday evening, June 14th. They were in bad condition, and Mr. Cummings, one of the plaintiffs, refused to receive them until he was directed by

the railroad agent at that point to remove them from the car and to hand in his bill for damages. Cummings immediately wired Eckert, joint owner of the stock, at Reading, the condition of the horses. On the following Monday, as Mr. Eckert testifies, he communicated with Mr. Fraim, the defendant company's freight agent at Reading, who had acted for the company in shipping the horses, "and told him that our horses had met with an accident and we would hold the company responsible." Fraim replied that "he would report it to the proper authorities and let me know." On Wednesday, June 18th, Mr. Fraim wrote the defendant's claim agent at Philadelphia, advising him of the change of cars, of the detention of the stock at Jersey City, of the injured condition of the horses, and that the plaintiffs ²⁷⁶ would doubtless claim damages. Accompanying and attached to this letter was a statement of the billing showing date of shipment, the number of horses shipped, and their destination. This letter was turned over to Mr. Baer, the defendant's livestock agent at Philadelphia, on June 20th. Under this date, Mr. Eckert, who was at Reading, also wrote Mr. Fraim, advising him fully as to the facts of the shipment, the transfer of the stock to an unfit car, its detention and bad treatment at Jersey City, and its condition on arriving at Readville, and inquiring whether the company was willing to take up the question of damages, stating the value of the horses to be about ten thousand dollars. Mr. Fraim, in forwarding this letter on the same date to the company's claim agent at Philadelphia, said: "Please see my letter to you dated June 18th, regarding this shipment, explaining about the same as Mr. Eckert has done in his letter attached." On July 14th, Mr. Baer wrote Mr. Eckert in reply to his letter to Mr. Fraim that "I cannot see that any damage would occur" by reason of the transfer of the horses to another car at Jersey City. It was not until the trial of the cause in November, 1903, nearly one year and a half after the plaintiff's stock had been injured, that the company gave any intimation that it would resist the plaintiffs' demand for damages because a verified written claim of loss had not been delivered within five days from the time the horses were removed from the car at their destination.

It is true, as we have held, that a carrier may insert in its contract to transport livestock a provision requiring notice of a claim for damages within a stipulated time, and such a provision is reasonable and will be enforced. But, as said in

Pavitt v. Lehigh Valley R. R. Co., 153 Pa. St. 302, 25 Atl. 1107: "It [the provision for notice of claim] is proper, because the demand promptly made gives warning and enables the carrier, while evidence is attainable and recollection is clear, to institute inquiry into the merits of the claim, and thus guard against fraud and overvaluation." The purpose of the provision, therefore, and the reason for its enforcement by the court, is to enable the carrier to make a prompt investigation of the merits of the claim, and thereby protect itself against imposition by the shipper. Being for the protection of the carrier, the latter may waive its right to enforce the provision: ²⁷⁷ *Pavitt v. Lehigh Valley R. R. Co.*, 153 Pa. St. 302, 25 Atl. 1107; *Hudson v. Northern Pac. R. R. Co.*, 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608; *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348. Here, as disclosed by the correspondence between the parties, the defendant company's agents were in possession of all the facts relative to the loss and the cause of it within five days of the delivery of the stock. This fact and the subsequent conduct of the defendant company were sufficient to go to the jury on the question of its waiver of the right to insist upon a formal written claim of the plaintiffs' loss; and hence, the court could not, as requested by the defendant, direct a verdict for the company on the ground that there had been no delivery of such a claim.

It is settled, as the authorities cited by the trial judge show, that for negligence by a common carrier in transporting goods intrusted to it, the shipper may, at his election, bring either an action *ex contractu* or an action *ex delicto*. It is also unquestionably the law of this state, as declared in numerous decisions of this court, that a common carrier cannot, by contract, limit its liability for the negligence of itself or its servants.

The able and exhaustive opinion of the learned trial judge, overruling the defendant's motion for judgment *non obstante veredicto* and for a new trial, in which he considers all the questions raised on this appeal, renders any further consideration of the assignments of error unnecessary.

The judgment is affirmed.

The Liability of Initial Carriers for losses occurring beyond their own lines is discussed in the recent monographic note to *Pennsylvania Co. v. Loftis*, 106 Am. St. Rep. 604-612. The principal case will be found cited on page 609 of this note. As to the burden of proof as

between connecting carriers to show who is at fault for a loss or injury, see the monographic note to *Beede v. Wisconsin Cent. Ry. Co.*, 101 Am. St. Rep. 392-399.

The Limitation of a Carrier's Liability in bills of lading is discussed in the extended note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74-134. Generally speaking, a carrier may, by agreement, limit to a reasonable extent his common-law liability, but not his liability for the consequences of his own negligence: *Fisher v. Boston etc. R. R. Co.*, 99 Me. 338, 105 Am. St. Rep. 283.

WETHERILL v. GALLAGHER.

[211 Pa. St. 306, 60 Atl. 905.]

INJUNCTION—Bailment—Removal of Fixtures.—If boilers are delivered to the lessee of a building under a contract of bailment, and he, after attaching the boilers to the building and after making some payments on such contract, is declared a bankrupt, the vendor of the boilers may maintain a bill in equity to enjoin interference with the boilers against the owner of the building and parties in collusion with him to defraud the complainant, and also against the mortgagee of the building who objects to the removal of the boilers, and also against the bankrupt and his trustee. He is entitled to such remedy because there is no adequate remedy at law. (p. 578.)

J. G. Johnson and F. J. Greiger, for the appellant.

E. O. Michener, for the appellee.

³⁰⁷ MESTREZAT, J. Francis G. Gallagher, one of the defendants, by written agreement dated July 10, 1902, leased to the Downing Paper Company, a corporation and one of the defendants, a lot of ground in the city of Philadelphia, together with the buildings erected thereon and the machinery and fixtures contained therein, being a plant for the manufacture of paper and felt. The lease was for one year from April 1, 1902, with the right of renewal from year to year on the terms therein set forth. The agreement provided that all betterments in the nature of permanent improvements or additions to the machinery which the lessee might thereafter place on the premises should belong to him, and that he might, at any time during the continuance of the lease or any renewal thereof, remove them from the premises.

The plaintiffs, by a written agreement dated December 21, 1903, leased to the Downing Paper Company, another defendant ³⁰⁸ in this suit, two 250 horse-power boilers, delivered and erected, including all the brickwork above the floor level,

at the latter's power station in Philadelphia, the property leased by Gallagher to the paper company. For the use of the boilers the lessee agreed to pay one thousand dollars in cash, and thereafter two hundred and fifty dollars per month rental in the form of twenty-five notes, to be dated upon completion of the erection of the boilers, and each note for the said amount to be payable every thirty days. The agreement provided that the lessee company would not sublet, dispose of, or remove from Philadelphia county the boilers without the consent of the lessors; that it would surrender up said property at the expiration of the lease, and that if it failed to comply with any of the provisions of the lease, the lessors should have the right to declare the lease void and to resume possession of the boilers, and in any proceeding for such purpose, with or without recourse to law, the lessee waived the right to bring any action against the lessors. It was further stipulated that upon the surrender of the boilers, the rent having been fully paid, the lessee had the option of purchasing the property for seven thousand two hundred and fifty dollars, the rent received to be applied upon the purchase price.

The plaintiffs installed the boilers on the Gallagher premises, and the paper company paid to them the one thousand dollars and the two promissory notes maturing March 20 and April 20, 1904, respectively, the rental payable at that time by the terms of the lease, but has not made any other payments on the rent or the notes evidencing the rental.

In May, 1904, the Downing Paper Company was adjudged a bankrupt on its own petition, and the defendant Lineaweaver was appointed receiver. He refused to pay the plaintiffs the monthly rental due May 20, 1904, under the lease, and subsequently declined, on request, to inform the plaintiffs whether he would pay the rental or preferred that the plaintiffs should exercise their right under the lease and remove the boilers.

The receiver advertised the equity of the bankrupts in the boilers for sale, whereupon the plaintiffs informed him that they exercised their right to declare the lease void and to take possession of the boilers. Subsequently, the district court of the United States, on application of the plaintiffs, ordered the receiver to withdraw the bankrupt's equity in the property ³⁰⁹ from sale and permit the plaintiffs to take possession of the property, and that all right, title and interest of the par-

ties and of the bankrupt's creditors to the boilers be referred to a referee, upon the plaintiffs giving bond conditioned to abide the orders of the court and agreeing to submit themselves to the jurisdiction of that court, with which conditions the plaintiffs complied.

The plaintiffs, by permission of the receiver, endeavored to take possession of the property, but were prevented by Gallagher, the landlord of the premises, who notified the plaintiffs that he proposed to retain the boilers as part of the real estate and would resist any attempt to remove them. The Fidelity Trust Company, executor, is the mortgagee of the real estate leased to the paper company, and it joined the landlord in preventing the removal of the boilers from the premises.

On July 6, 1904, the district court of the United States made an order granting the plaintiffs leave to institute in the court of common pleas of Philadelphia county "any legal or equitable proceeding for the purpose of determining the title to said boilers." On July 13, 1904, Lineaweaver was appointed trustee in bankruptcy of the Downing Paper Company.

The plaintiffs filed this bill against Francis G. Gallagher, S. Arthur Love, Emma R. M. Love, the Fidelity Trust Company, surviving executor of the will of Henry Gibson, deceased, and the Downing Paper Company and James I. Lineaweaver, its trustee in bankruptcy. The bill set forth the above-stated facts and averred that the paper company and its trustee in bankruptcy were, under the lease, trustees of the boilers for the plaintiffs, that the company and its trustee had violated their trust and refused to surrender the boilers, that the plaintiffs believe that the Loves or one of them were the real owners of the premises leased from Gallagher, and that the title was placed in him for the purpose of defrauding the creditors of S. Arthur Love. It prayed that the plaintiffs be declared owners of the boilers, that the defendants be required to deliver up possession of them, and be enjoined from disposing of or injuring them, that Gallagher and the Loves make discovery as to who is the real owner of the demised premises and be restrained from mortgaging or disposing of the real estate, including the boilers as part thereof, that the defendants ³¹⁰ be restrained from preventing the plaintiffs from removing the boilers, and that the paper company and Lineaweaver be directed to specifically perform the terms of the lease and surrender the boilers to the plaintiffs.

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Gallagher and the Loves demurred and assigned for causes of demurrer that upon the face of the bill the plaintiffs are not entitled to the relief claimed, that the court has no jurisdiction of the bill, and that the plaintiffs have a good and sufficient action at law for the redress of their alleged wrongs.

The learned court below, common pleas No. 5 of Philadelphia county, without filing an opinion, made the following decree: "October 29, 1904, demurrer sustained." From this decree the plaintiffs have appealed.

The sole question in this case is, as suggested by the learned counsel for defendants, whether upon the facts averred in the bill a court of equity has jurisdiction.

We think the facts disclosed by the bill warrant a court of equity in taking jurisdiction. The remedy at law would be neither adequate, complete nor convenient.

Of course, assumpsit against the Downing Paper Company would not avail the plaintiffs, nor do we think trover or replevin would be effective in enforcing the plaintiffs' claim. The boilers were attached to the freehold by the paper company and are, therefore, fixtures and a part of the real estate, unless they retain their character of personalty by virtue of the agreement or lease between the plaintiffs and the paper company. Gallagher, the registered owner of the real estate, is now in possession of it and also of the boilers, and claims the latter as fixtures. It is averred in the bill, however, that S. Arthur Love, or his wife, is the real owner of the premises and that the title was placed in Gallagher for the purpose of defrauding Love's creditors. It is also alleged that Love was the treasurer of the paper company and conducted all the negotiations with the plaintiffs which terminated in the lease of the boilers to that company, and that the detention of the boilers by Gallagher is in pursuance of an agreement between him and the Loves for the purpose of defrauding the plaintiffs of their property rights in the boilers. It, therefore, may be material to the plaintiffs in asserting their claim to the property to ascertain and have determined whether Gallagher or Love ³¹¹ is the real owner of the premises on which the boilers were installed. If Love is the owner his knowledge of and acquiescence in the lease may prevent him from denying the character of the boilers as personal property. It is not alleged that Gallagher had knowledge of the plaintiffs' lease, or of any of its stipulations, but we need not now determine his rights to the boilers as against the plaintiffs. It is appar-

ent, therefore, that the plaintiffs, in enforcing their claim, need equitable relief to enable them to have determined Love's ownership of the premises on which the boilers were placed by the paper company.

Replevin would not be a certain remedy against Gallagher for the property in dispute. The paper company, and not he, installed the boilers on the Gallagher premises. It is claimed that the sheriff, on a writ of replevin, cannot detach the property and deliver it to the plaintiffs, and that he cannot require Gallagher to give a claim property bond. The latter, therefore, could sell the premises, and it has been held that the title to the boilers would pass to an innocent purchaser without notice of the plaintiffs' claim: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235, 23 N. E. 327, 6 L. R. A. 249; *Tibbets v. Horne*, 65 N. H. 242, 23 Am. St. Rep. 31; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446; *Landigan v. Mayer*, 32 Or. 245, 67 Am. St. Rep. 521, 51 Pac. 649. Under these circumstances, the writ, it is true, can be issued against Gallagher: *Bower v. Tallman*, 5 Watts & S. 556; but if the plaintiffs sustain their claim to the property, and the issue is found for them, they will secure simply a judgment for the amount of their claim, which can only be enforced by an execution against Gallagher which will not avail them if he is financially irresponsible. A judgment in assumpsit or trover would be equally as effective.

That Gallagher may not encumber or dispose of the real estate and thereby deprive the plaintiffs of their property, the latter are entitled to an injunction restraining him from taking such action until their claim against him for the boilers has been judicially determined. They are entitled to the most effective remedy given by the law to enforce their claim, and hence they have the right to have the property itself, which ³¹² they allege belongs to them, remain in statu quo, and within the jurisdiction of the court, until their right to it has been determined. They are not compelled to accept the less efficient remedy of the personal security of the individual who is in possession of the property and withholding it from them.

While not sufficient possibly in itself to confer equity jurisdiction, the large number of claimants to this property and the different rights by which they claim it, render the plastic procedure of equity a convenient, as well as an effective, remedy for determining its ownership. The rights and interests of all the parties of and in the property in dispute may be ad-

judicated in this one proceeding, and in the meantime, the court can protect and preserve the property for the successful claimant.

In this state the action of replevin is not only a proceeding in rem, but also a proceeding against the defendant in the writ personally. Generally speaking, it lies wherever one person claims personal property in the possession of another, provided the claimant has the right of possession; and there is no doubt that it will lie for property held by the defendant under a contract of bailment. The act of April 19, 1901 (Pub. Laws, 88), has made the remedy by replevin more speedy and effective than under the former practice in such actions. The bond required of the plaintiff and the defendant, and the counter-bond by an intervener under the act of 1901, would afford complete protection to all parties interested in the property in controversy if it was detached from the real estate. But notwithstanding its efficiency in reaching personal property, the action of replevin would fail to meet the requirements of this case. The Downing Paper Company, the lessee, is not in possession of the boilers, nor have they passed to, or are they held by, another as personal property. They are now held by Gallagher, the lessor of the real estate, on which they were placed by the lessee, and he proposes to hold the boilers as part of the real estate. For the same reason, the mortgagee of the real estate denies the right of the plaintiffs to repossess themselves of the property. The facts of this case, therefore, show that the remedy would be inadequate and ineffective in the enforcement of the plaintiffs' claim.

We indicate no opinion as to the rights of any of the parties ³¹³ to this controversy, but hold that under the facts averred by the plaintiffs, the demurrer should have been overruled and the bill should have been sustained.

The decree of the court below is reversed and a procedendo is awarded.

An Injunction will lie against a trespass upon property, as a general rule, whenever the legal remedies for the injury are inadequate: See the monographic note to *Moore v. Halliday*, 99 Am. St. Rep. 732-734.

JONES' ESTATE.

[211 Pa. St. 364, 60 Atl. 915.]

WILLS—Legacies—Lapse by Divorce.—A legacy in the words "one-third to my wife," naming her, does not lapse, when such wife after the date of the will, at her own instance, obtains a divorce a vinculo matrimonii from the testator. In such case the words "my wife" are only descriptive and do not import a condition that the beneficiary shall remain the wife of the testator. (pp. 583, 584.)

WILLS—Legacies—Revocation by Divorce.—A bequest of a legacy "to my wife" is not revoked by implication by her subsequently obtaining an absolute divorce at her own instance from the testator. (p. 588.)

D. T. Watson, G. C. Wilson and W. D. Evans, for the appellant.

W. I. Seymour and H. K. Siebeneck, for the appellee.

380 POTTER, J. The questions presented by this appeal, as stated by the appellant, are:

1. Does a legacy, in these words, "one-third to my wife, Mary Brown Jones," lapse, when the wife, subsequent to the date of the will, at her own instance, obtains a divorce a vinculo matrimonii?

2. Is a bequest "to my wife Mary Brown Jones" revoked by implication, by reason of absolute divorce?

We take up these questions in order.

What is there in the facts of this case to support the claim that the legacy has lapsed? The person named as legatee did not die in the lifetime of the testator, nor did any other event occur in the lifetime of the testator, which, under the language of the will, would render the testamentary gift inoperative. The donee survived the testator and is alive, and has both capacity and willingness to take under the will. But it is suggested in the argument, that while not physically dead, the 381 donee by her own act in obtaining the decree of divorce, ended the marital relation, as absolutely as death would have done. This consequence did follow the divorce, in so far as the duties, rights and claims accruing to her by reason of the marriage are concerned. With respect to the determination of these rights, and these alone, is divorce the equivalent of death. The decree in divorce took away only what the law gave to her

when the marriage was contracted. This was the right to support, and to dower in his estate if she survived him. After the entry of the decree, the testator was no longer bound to provide for her, and she had no further claim upon his estate. What the law gave, it took away; nothing more.

The beneficiary is not here claiming anything which accrued to her in pursuance of her marriage. She is here only as a legatee, and is asking for that only which the testator gave to her of his free grace, and as a matter of bounty. That which he gave to her in his will was his own, to give or to withhold as he saw fit. A bequest needs no consideration to support it. As a legatee she stands upon the same footing as any other individual, and her relation to the testator has nothing to do with the case, unless he chose to make it an element in the bestowal of the gift. Did he do so? The provision in the will is as follows: "I direct that my funeral expenses and all debts be promptly paid, and that my estate be divided as follows: One-third to my wife, Mary Brown Jones, and the balance to my son, Thomas Mifflin Jones." The will was dated April 24, 1899, and Mary Brown Jones was then the wife of the testator. On February 6, 1900, the said Mary Brown Jones began proceedings in divorce, and the decree was granted to her on September 19, 1900. Thomas M. Jones, Jr., the testator, lived about one year and eight months after the divorce was granted, and died on May 17, 1902. Mary Brown Jones did not remarry during the lifetime of the said Thomas M. Jones, Jr., but she did marry about six months after his death. It will be noticed that the gift was to "my wife, Mary Brown Jones," without any conditions or limitations. The testator gives the one-third of his estate to a particular person, naming her, and further identifying her by the statement that she is his wife; that is in substance what he says. He makes no stipulation that she shall remain his wife, or be such at the time of his death. We are clear that ³⁸² such use of the word "wife" as is here made is descriptive only, and does not imply any continuing condition.

"The mere fact that a gift is made to a named legatee in a certain character, as, for instance, to my wife A, does not avoid the legacy, if the legatee does not happen to fill the character": Theobald on Wills, 5th ed., p. 247. In

Bullock v. Zilley, 1 N. J. Eq. 489, the words "his wife," as applied to complainant, were held to be mere words of description of the individual, and not as defining the capacity in which she was to benefit. In *Mellon's Estate*, 28 Week. Not. Cas. 120, where the beneficiary was named as "T. W., the husband of my said daughter," the word "husband" was held to be a description of the person and not of the character in which he was to take. The reasoning of Judge Penrose fits accurately this case. He said: "We may conjecture, but we cannot be certain, that the inducing cause of the provision for Thomas Waller was that he was the husband of the testator's daughter. The relationship, however, could not have been the sole motive, since the gift is to the individual by name, and not to him simply as husband, nor is there, as in *Bell v. Smalley*, 45 N. J. Eq. 478, 18 Atl. 70, the evidence offered by the restriction of the bounty to the time during which the beneficiary remains unmarried. We have no right to say that the gift was subject to the condition that the donee should at the time it took effect be the husband of the daughter."

In *Brown v. A. O. U. W.*, 208 Pa. St. 101, 57 Atl. 176, where a certificate was payable at the death of John Brown to his wife, Mattie Brown, we held that it was for the individual, Mattie Brown, without regard to the fact of her continuing to be the wife of the member, and subsequent divorce did not forfeit her right. The husband there had the power to change the beneficiary at any time, and we held that the fact that he did not do so, during a period of eight years between the divorce and his death, made evident his intention not to deprive his first wife of the benefit of the policy. "Where a man retains a revocable instrument with full opportunity of revoking it, and does not revoke it, there is a strong presumption that he wishes it to stand": *Tilghman, C. J.*, in *Irish v. Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648.

We are clear that the will indicates that the testator intended the gift for the individual, Mary Brown Jones, who was at that ³⁹³ time his wife, and identified by him as such. We think the bequest is unrestricted, and that the words, "my wife," are, as we said above, only descriptive, and do not import a condition that the beneficiary

shall remain his wife. Nor do we doubt that as to the object of the legacy the will speaks from its date: *Anshutz v. Miller*, 81 Pa. St. 212. "Prima facie a gift to the wife of A, who had a wife living at the date of the will, goes to that wife and no other. . . . If there is anything on the face of the will to show that an existing person is referred to, the case is clear": *Theobald on Wills*, 249.

Nor is there anything in the act of June 4, 1879 (Pub. Laws, 88) to the contrary. Under the requirements of that act, it is "with reference to any real or personal estate embraced in it" that every will shall speak as of the testator's death. In *Robeno v. Marlatt*, 136 Pa. St. 35, 20 Atl. 512, the court below said, on page 37: "It is claimed, however, that the act of June 4, 1879, bars their (after-born children) right. This act has received judicial construction, the results of which are that as to the condition of the donees the will speaks as of the date; as to the subjects of the testamentary disposition, the will is construed as of the death; as to the objects, that is, the persons who are to take under it, and their condition, the will speaks as of its date; as to the testator's condition, it is to be considered as of its date. The act is restricted in its effect to the real and personal property passing under it." And this statement was affirmed by this court.

But turning to the second question presented here, it is elaborately argued that, as matter of law, the bequest to Mary Brown Jones was impliedly revoked by reason of the divorce. No authority has been cited in support of the proposition that divorce in itself is sufficient to work a revocation of a will, and we are not aware that any exists. The only case which has been cited by counsel as sustaining this position is *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699. But examination shows that the Michigan statute allows the court to determine whether the subsequent changes in the condition or circumstances of the testator, are sufficient to work an implied revocation of the will. And the decision in that case rested also upon the fact that pending the divorce proceeding there was a settlement of the property rights of the parties. A division of the real estate was ³⁸⁴ made, each deeding to the other. An agreement was also made by which the husband conveyed to the wife certain personal property,

and she agreed to release him from all demands of every kind or nature. The agreement stated that it, and the deeds executed by them, were intended as a property settlement between them. This was a practical satisfaction of the bequest, and amounted to an ademption.

As we read this decision, it was controlled by the fact of the settlement of property rights between the parties and not by the divorce itself. At common law, the doctrine of implied revocation of a will from change of circumstances, did not include divorce. In fact the instances were few, under the common law, in which an alteration of circumstances was held sufficient to justify an implied revocation. Both at common law and under the statutes of most of the states, it is only certain definite changes in the condition or family relations of the testator which impliedly revoke a will, executed before such changes. The great weight of authority is that no changes beyond the few which have been many times specifically enumerated and recognized as sufficient for the purpose, can have this effect: Page on Wills, sec. 280. A will may be so easily revoked by the testator in his lifetime that the courts have been slow in permitting changes in circumstances to do, by implication, what the testator may so readily do for himself. In *Wogan v. Small*, 11 Serg. & R. 141, Tilghman, C. J., said: "There is one case, and only one, in which it has hitherto been thought proper to decide that the revocation of a will might be implied from an alteration of circumstances, and that is, when the testator married and had a child, subsequently to the making of his will; but both circumstances must concur. . . . The danger of this principle of implied revocation is very great, and that is the reason why, although very strong cases of hardship have occurred, the judges have never ventured to advance beyond that one step. We have the less reason to resort to implied revocation, as our legislation has provided for the case of subsequent marriage or children by the act of April 19, 1794 (3 Sm. L. 143). . . . Once establish the judicial habit of examining the situation of a man's fortune or family, and revoking his will, because he has made an absurd or an inhuman disposition of his property, or because we merely ⁸⁸⁵ suppose he was ignorant of the state of his

affairs, or of the law, and no man's will is safe." These words were weighty then, they should be equally so now.

The opening sentences in *Marshall v. Marshall*, 11 Pa. St. 430, are obiter dicta, for there was no occasion in that case to consider the question of what was sufficient to justify an implied revocation of a will. That subject was not before the court. The testator in that case, after devising one tract of land to one son and another tract of land to another son, subsequently sold the first tract. It was urged that this would work a revocation of the whole will. But the court decided that the sale affected only the devise of the tract in question, and the residue of the will remained in full force. It was a case of ademption, which applies only to the subject matter of testamentary disposition. When the subject matter bequeathed is sold, or disposed of, it is thereby completely extinguished, and nothing remains to which the words of the will can apply. The principle of ademption is entirely distinct from that of an implied revocation of the terms of the will. Ademption has to do with the subject matter of the bequests, while the doctrine of implied revocation is founded upon a presumed neglect of duty, upon the part of the testator, or upon a change in his family relations. Ademption involves action upon the part of the testator; the doing of some act with regard to the subject matter, which interferes with the operation of the words of the will. That is he anticipates the gift there made, by bestowing it during his lifetime upon the legatee, or disposes of the subject matter in some way which puts it out of the question to follow his directions as set forth in the will. Nothing of that kind has been done in the present case. The testator has not interfered with his estate in any way inconsistent with the terms of his will.

The statutory rules in Pennsylvania, as to the revocation of wills, are reviewed by Read, J., in *Walker v. Hall*, 34 Pa. St. 483, and on page 487 he says "we have in reality substituted for the common-law rule, one of our own, depending entirely upon our statutory enactments"; and he concludes with the statement that our rules are not open to the doctrine of implied presumption. In *Young's Appeal*, 39 Pa. St. 115, the court held that the testamentary paper was executed under a special ³⁸⁶ power, and not

under the statute of wills. Whatever is there said, as to a change in circumstances which create new moral duties, amounting to implied revocation, is obiter dicta, in so far as it goes beyond the conditions enumerated in the statutory enactments. The decision was that the will was revoked by the birth of a son to testatrix after the making of the will. While it was the disposition of an equitable estate, yet it followed the principle of the statute.

We are by no means singular in holding to the doctrine that the changed condition of the testator must be within the conditions named in the statutes, for this view prevails largely in other states; for instance, in *Re Comassi's Estate*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414, it is said, "in order to determine whether a will has been properly executed or revoked, or whether, after its execution, there has been such a change in the status or personal relations of the testator as in law will effect its revocation, we have only to determine whether the changed condition of the testator is within the condition named in the statute (cites code). . . . The effect of these provisions is to do away with the doctrine of implied revocation, which was for so many years a subject of controversy in the English courts, and which, in many of the states of this country, is still permitted under a clause in their statutes, authorizing a revocation to be 'implied by law for subsequent changes in the condition of the testator.' " And in *Davis v. Fogle*, 124 Ind. 41, 23 N. E. 860, 7 L. R. A. 485: "It is manifest that no act, thing or deed will revoke a will once duly executed, unless it comes within the provisions of the statute providing for the revocation of wills." In *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 359, 20 N. W. 891, the court says: "There is no sound reason that we can perceive why, in the absence of statutes, implied revocation should be extended." And in *Schouler on Wills*, section 427, it is said: "In short, revocation of a particular will by mere inference of law or presumption, is limited to a very few instances in our modern practice. Modern legislation itself repudiates in England and some of our states, the old theory of implied intention to revoke on the ground of alteration of circumstances ³⁸⁷ and what is left of that theory aside from such statutes it would be very difficult to say."

A case much like the present is *Card v. Alexander*, 48 Conn. 492, 40 Am. Rep. 187. There the bequest was to "my wife Amelia." A year and a half after the execution of the will, the testator obtained a divorce from his wife for her misconduct, and four years afterward died, without changing his will. It was held that the bequest was not to be regarded as conditioned upon the wife continuing to be such until his death; and that the divorce did not as matter of law impliedly revoke the will. The circumstances of the divorce in that case spoke more strongly against the claimant than here. In the present case, it was the misconduct of the testator which caused the divorce.

We can see nothing in the facts of this case which would justify any extension of the doctrine of implied revocation. The reason which lies behind the doctrine as defined both in the common law and by the statutes, is that some obvious injustice may be prevented. That some moral duty, which has been overlooked, it is presumed, by the testator, may be discharged. What would be the result of holding in this case that the change in circumstances worked a revocation? Only this: the whole estate of testator would go to his son, to the entire exclusion therefrom of his former wife and the mother of his child. Can it be said that the obtaining by the wife of a divorce, by reason of the misconduct of the testator, entailed upon him any moral duty to destroy the provision which he had made in his will, for the woman who was for years his faithful wife, in order to pile up far more than a competency for their child.

The only inference which can be drawn from the record in this case is that the testator, and he alone, was responsible for the rupture of the marital ties. It may well be, then, that by the provision in his will he intended to make some reparation for the sorrow and distress he brought upon his wife. To impute to him such intention would be more kind than to presume, as is urged in the argument, that he was filled with resentment, and became possessed by an ignoble purpose which he failed to carry out. He must have known that he could change or destroy his will at any time, yet he did not do so.

³⁸⁸ We agree with the conclusions reached and stated by the auditing judge in his careful and able opinion, that "To hold under the facts in this case that the divorce re-

voked this bequest would not be in accordance with statutory regulations, and would be extending the doctrine of an implied revocation beyond any authoritative adjudication; and would be contrary to the express and implied intention of the testator."

The specifications of error are overruled. The decree of the orphans' court is affirmed and this appeal is dismissed, at the cost of the appellant.

Mr. Chief Justice Mitchell Dissented, adopting the view of the questions involved as expressed by Mr. Presiding Judge Hawkins of the lower court who dissent 1 from the opinion rendered there. The opinion of Mr. Judge Hawkins was as follows: "If Mr. Jones had died intestate it must be conceded that this claimant would have no standing here. Her right to claim in distribution would have depended on the continuance of the marital relation, and that had been terminated by her act as completely as though she had died before Mr. Jones. The law gave her the option of qualified or absolute divorce, and having chosen the latter she would voluntarily have relinquished her whole interest in his estate. The statute of divorce prescribes that upon the dissolution of the marriage, 'all and every the duties, rights, and claims accruing to either of the parties at any time theretofore in pursuance of said marriage shall cease and determine,' and to this extent is part of the law of distribution. And why not apply this broad principle to wills. Because, says counsel, there can be no implied revocation without statutory prescription, and divorce is not prescribed, but it is fully established that change of circumstances raises a presumption of change of intention and works a revocation of a will, and this presumption is said to be so strong that it may not be rebutted by parol evidence, on the ground that this would be productive of the evils which were intended to be averted by the statute of frauds: *Marshall v. Marshall*, 11 Pa. St. 430; *Young's Appeal*, 39 Pa. St. 115, 80 Am. Dec. 513; *Carey's Appeal*, 75 Pa. St. 201. No one can doubt that refusal to accept a legacy will work revocation pro tanto: *Boyce's Estate*, 194 Pa. St. 135, 44 Atl. 1076. And so in *Lee's Estate*, 207 Pa. St. 218, 56 Atl. 425, it was held that a decree of divorce implied the revocation of a coverture trust, upon the ground that 'the law has severed the matrimonial bond as affectually as death would have done.' It seems clear, therefore, that there may be an implied revocation of wills outside of statutory prescription.

"The pivotal question, then, is whether or not the change of conditions since the making of this will produced such a change in testator's previous moral obligations and duties as raises a reasonable presumption of alteration of his mind and implies revocation of the be-

quest which he had made to his wife? If the gift was made because of the existence of the marital relation, divorce would certainly take away the reason for it; and without the reason which inspired, the legatee could have no equity to claim it. It is immaterial whether her husband made a will or not; for her application having been a voluntary and absolute renunciation of 'all and every the duties, rights, and claims accruing . . . in pursuance of the marriage,' she took the risk, and should abide the consequence. It is safe to assume that the gift would not have been made if the beneficiary had not stood in the relation of wife. It may be that Mr. Jones' misconduct was so gross as to justify his wife leaving him, and that under the spur of remorse he made the will as a peace offering. But it would be asking too much of human nature to expect the husband to make such a gift in anticipation of his wife's application for divorce and remarriage. 'The natural presumption arising from these changed relations,' said the court in *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, 'is the reasonable one, and the one from which the law implies a revocation. The question is not to be determined by a possible presumption, but by the reasonable presumption. The possibility, therefore, that the deceased might have desired that the remainder of his property should go to his divorced wife, cannot be considered in determining the question of implied revocation in this case. Such disposition of his property would be unusual, and contrary to common experience,' and the grounds of divorce may be such as to make her claim 'repugnant to that common sense and reason upon which the law is based.'

"There is obviously an essential difference between a gift to 'My wife, Mary Brown Jones,' and a gift to 'Mary Brown Jones,' without more. Irrespective of technical rules, no one would hesitate to infer that the first was descriptive of the marital relation, and imported on its face that the gift was made because of that relation; and that the latter was descriptive of the individual, and imported an absolute gift. The difference of description would imply difference in purpose. So there is a material difference between a gift to a testator's wife and a gift to the wife of another in this: that the former necessarily implies recognition of a marital duty, and is therefore dependent on its continued existence; while the latter implies no more than a purpose of identification of the object of bounty. The question in this case is not who was intended to take—for Mr. Jones cannot be supposed to have had in contemplation a future wife—but the character in which this legatee was intended to take, whether because of her marital relation to testator or simply as an individual. If given because of the marital relation, as the description imports, she can take it in no other character than as widow. It is suggested that to produce this effect an express condition of con-

tinuance of the marriage relation must have been attached to the gift; but there is no apparent reason why an implied condition should not be just as effective, and the form of this gift implies continuance. Not only does the description of the legatee import on its face a conditional gift, but the quantity of the gift implies that testator had in view the intestate law, and therefore marital right, as the reason. There is a well-settled principle that a widow will be presumed to take under the intestate law, rather than under her husband's will, where her interest is the same in either event: *Davison's Appeal*, 95 Pa. St. 394. The statute furnishes the general rule of distribution, and the will is simply declarative, and therefore no election is necessary; and, conversely, the testator must be presumed to have given in the same right in which this interest is taken by his widow, and therefore because of relationship to his widow as such. While it is said that this estate consisted in part of realty, the natural inference is that the gift of 'one-third' of the estate, which consisted largely of personalty, was suggested by the intestate law, and that consequently Mr. Jones had in view his wife's marital right under that law as distinguished from her individual right. It was also upon this principle of implied conformity to the intestate law that bequests to a mother and her children gave the mother but a life estate (*Hague v. Hague*, 161 Pa. St. 643, 41 Am. St. Rep. 900, 29 Atl. 261); and a legacy by a father to a child is understood as a portion, because it is a provision by a parent for his child: *Miner v. Atherton*, 35 Pa. St. 528. And it is upon a similar principle that a legacy is considered to have been given in satisfaction of a debt, rather than as an independent gift, where there is identity in amount. An intent to give because of the marital relation is therefore apparent.

"What Mr. Jones did or failed to do after the divorce was granted has nothing to do with the question involved here. If the divorce worked a revocation, it could not be republished in any manner other than that prescribed by the statute of wills. Many wills have been revoked pro tanto by implication—as, for example, in case of ademption—without a suggestion that testator was required to make it effectual by a written modification of his will. The case of *Brown v. Grand Lodge*, 208 Pa. St. 101, 57 Atl. 176, is clearly distinguishable from this in that it was based upon a contract whose terms made change of beneficiary dependent on the act of the assured. Why Mr. Jones did not do what he was not required to do, the evidence fails to show. He may not have been in a condition after the divorce to have taken action, or he may have been advised or thought it unnecessary; but, in any event, he owed no duty to this claimant. It may be conceded that there are English cases inconsistent with this view—some of them arising on marriage articles, and some on wills; but the cases even there were not harmonious. Vice-Chancellor Malins said of *Boreham v. Bignall*, 8 Hare, 131, 19 L. J. Ch. 464, 14 Jur.

265, the leading case, that the court evidently thought, from the peculiar language used, that there was an intention to benefit the particular wife of his nephew, then living, and that the court might well have come to a different conclusion. In *Garratt v. Niblock*, 1 Russ. & M. 629, it was held that by the expression 'my beloved wife' testator must have meant a particular wife; and so in *Bryan's Trust*, 2 Sim., N. S., 103, 21 L. J. Ch. 7, the language of the gift was held to point out a particular husband: *Lyne's Trust*, L. R. 8 Eq. 65, 38 L. J. Ch. 471, 20 L. T. 735, 17 Week. Rep. 840. On the other hand, where there was a devise to testator's nephew for life, with remainder to the nephew's wife for life, with remainder to children of his nephew by said wife, it was held to extend to the nephew's second wife: *Peppin v. Bickford*, 3 Ves. 570, 4 R. R. 103. In a somewhat similar case *Vice-Chancellor Malins* reached the same conclusion. Attention is called to the fact that Sir George Jeckyl, master of the rolls, in a subsequent case disapproved of this decision; but he was noted for his disregard of precedent, and his dictum might not stand against the ruling of a court of superior jurisdiction. Two cases were also cited on behalf of claimant from supreme court reports in this country against implied revocation by divorce; but an examination of these cases will show that they are not applicable here. In the first (*Bullock v. Zilley*, 1 N. J. Eq. 489), the bequest was, not to the testator's wife, but to his son, 'Thomas Bullock, and Rebecca, his wife,' and the decision was rested upon four grounds suggested by the peculiar language of the will as showing testamentary intent to make an absolute gift. No authorities were cited. In the other case (*Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307), the bequest was made in contemplation of marriage, and the court very properly held that it did not depend on marriage, and could not, therefore, be lost by divorce. Even those cases which deny implied revocation by divorce concede that a slight indication of a different intent will prevail, and are therefore distinguishable from the present case on this ground. On the other hand, the case of *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, cited for the estate, is a strong authority in support of the doctrine of implied revocation by divorce. Mr. Lansing and wife executed mutual wills of their respective estates, and were afterward divorced. Pending the suit in divorce they entered into an agreement of division and release of their property, but no reference was made therein to their wills; and on Mr. Lansing's death an issue was raised of implied revocation on Mrs. Lansing's presentation of the will. In a very able opinion by Mr. Justice Grant the court held that because of the absence of any reference to the will the agreement did not amount to an express revocation under their statute, but that an implied revocation arose from the divorce. 'By the decree of divorce in this case,' said the court, 'the parties became as strangers to each other, and neither

owed to the other any obligation or duty thereafter. There was therefore a complete change in their relations'; and the case fell within the principle laid down by Chancellor Kent, as above quoted. No Pennsylvania supreme court decision has been found in conflict with this view. The case of *Brown v. Grand Lodge*, 208 Pa. St. 101, 67 Atl. 176, cited on behalf of claimant, is, as already suggested, distinguishable from this by the fact that the right of the beneficiary had been fixed by contract subject to a new designation on the part of the assured which was never made, whereas revocation here arose by implication of law, and there was no republication as prescribed by statute. The case may, therefore, to use the language of the court in *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, be decided on the 'common sense and reason upon which the law is based.'

"None of the judges who deny implied revocation by divorce attempt to reconcile his position with the common-law doctrine of implied revocation of will from change of circumstances, and logically they are irreconcilable, for there can be no change of circumstance more radical than that produced by divorce. If ademption will imply revocation, much more should this. A husband, as such, may show the greatest generosity in testamentary disposition; but it is not in human nature to give to her who has held his domestic faults up to public gaze as a means of dissolving marriage. Who would for a moment believe that if Mr. Jones were living to-day he would give Mrs. Speer 'one-third' of his estate? To ask is to answer the question. Independent of the personal question, consideration for his son's interest would have a deterrent effect. The divorce caused such change in circumstances that his son became presumptively the sole object of testamentary obligation. And, on the other hand, it is impossible to understand how, in view of Mrs. Speer's renunciation, she can consistently claim what, without the existence of the marital relation, would never have been given. She has no equity to recognition."

The Revocation of Wills is discussed generally in the monographic note to *Graham v. Burch*, 28 Am. St. Rep. 244-362. As to whether a divorce works an implied revocation of a will made by one of the spouses in favor of the other, see *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545; *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307. A married woman named as a beneficiary in a policy of insurance on the life of her husband is entitled to the proceeds of the policy, notwithstanding a divorce is obtained by her before his death: *White v. Brotherhood of American Yeomen*, 124 Iowa, 293, 104 Am. St. Rep. 323.

COMMONWEALTH v. FURMAN.

[211 Pa. St. 549, 60 Atl. 1089.]

WITNESSES—Competency of Infant.—The substantial test of the competency of an infant witness is his intelligence, and his comprehension of an obligation to tell the truth; and if a full and present understanding of an obligation to tell it is shown by the witness that is sufficient. (p. 594.)

WITNESSES—Competency of Infant.—A boy eight years of age is competent as a witness if it appears that he clearly comprehends the difference between truth and falsehood, that the truth is what is demanded of him, and that punishment will follow the telling of a falsehood while he is a witness. (p. 595.)

W. G. Kendig and J. E. Malone, for the appellant.

W. U. Hensel, J. W. Brown, district attorney, F. S. Groff, ex-district attorney, and W. R. Brinton, for the appellee.

⁵⁵⁰ Per CURLAM. No question is raised by this appeal as to the guilt of the prisoner, or the justice and propriety of his conviction. The single assignment of error is to the admission as a witness of a boy of eight years whose testimony was not material to the establishment of the prisoner's guilt and had no practical bearing on it. The objection raises no more than a question of technical error in theoretical law.

The substantial test of the competency of an infant witness is his intelligence, and his comprehension of an obligation to tell the truth. The truth is what the law, under the rules of evidence is seeking, and if a full and present understanding of the obligation to tell it is shown by the witness, the nature of his conception of the obligation is of secondary importance. Each witness must be qualified by an obligation that has a solemn sanction to him, though like the breaking of a plate or beheading a chicken, as in case of some nationalities, it appears frivolous or offensive to others. In the present case the witness clearly comprehended the difference between truth and falsehood, and his duty to tell the truth. That was the substance of qualification as a witness. The trial judge in whose discretion the matter very largely rested was satisfied of the competency of the boy, and we are of opinion that his discretion was well exercised. After quoting from 3 Wig-

more on Evidence, section 1821, he added: "It seems to us that the crude and shadowy beliefs of small children concerning God and the hereafter are so uncertain, that the tests, based upon religious instruction, even though given by the trial judge himself, are of little or no moment, and should rather be discarded than followed in this enlightened age. The whole purpose of the trial is to ascertain the truth, and the oath is in pursuance of that object. If the witness understands that this is demanded and ⁵⁵¹ that punishment will follow its violation, it is sufficient. It is the substance, instead of the form, that is required, and if we secure this, there would seem to be little benefit in pursuing the shadow. A witness may easily show intelligence and understanding, without being asked each perfunctory question. In this case, it appeared to us that the boy understood perfectly the position in which he was placed, and that the truth was what was demanded of him. There was no reason why he, nor anyone connected with him should testify except from their actual knowledge, and the testimony itself shows the care with which the respective stories were told."

Judgment affirmed and record remitted for purpose of execution according to law.

There is No Fixed Age when an infant becomes competent to testify as a witness. Children seven or eight years old have been permitted to testify on the trial of grave crimes: See McGuff v. State, 88 Ala. 147, 16 Am. St. Rep. 25, and cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

MOORE v. SNOWBALL.

[98 Tex. 16, 81 S. W. 5.]

JUDGMENTS—Res Judicata—Equitable Relief.—A judgment for defendant in an action of trespass to try title to land sold under a judgment foreclosing a tax lien and to set aside the latter judgment is not a bar to a subsequent suit in equity to set aside the sheriff's deed for irregularities in the sale, and gross inadequacy of price. The two suits, together with the issues and the evidence to support them, are separate and distinct. (pp. 602, 603.)

Coleman & Abbott and W. J. Howard, for the appellant.

Ewing & Ring and J. R. Masterson, for the appellee.

20 WILLIAMS, A. J. Certificate from the court of civil appeals for the first district, as follows:

“James B. Snowball brought this suit, as by bill in equity, to set aside a sheriff's sale, under execution, of real estate to the defendant, L. E. Moore, on account of attendant irregularities which it was alleged had conduced to sacrifice the property for a grossly inadequate price, the petition expressly affirming the title, both legal and equitable, to be in the defendant, L. E. Moore, the purchaser at such sheriff's sale, but seeking, as a matter of affirmative equitable relief, to regain such title on account of the equity mentioned, as would be by reconveyance in equity. The city of Houston and James Snowball, the plaintiff's father, were joined as defendants; but the former disclaimed, judgment being entered as to it accordingly, and the latter, by a cross-petition, set up as to himself the same allegations made by the plaintiff, and became in effect a coplaintiff. The defendant, L. E. Moore, answered, so far as necessary to state, by general denial, by plea in bar of former recovery as res adjudicata, by plea of improvements

in good faith, and by cross-plea for recovery. The plaintiff and cross-plaintiff replied by first supplemental petition, denying generally the averments of the answer, and specially pleading claim for rents from the premises, and that, in so far as the alleged former suit rested upon the cross-action therein, said plaintiffs had neither been cited nor appeared thereto, and that no guardian ad litem had been appointed therein for the plaintiff James B. Snowball, who was then a minor. The defendant, L. E. Moore, by first supplemental answer, put in a general denial to said supplemental petition. The case was tried with a jury and resulted in a verdict and judgment for said plaintiffs on January 17, 1903, awarding to them the equitable relief sought in respect to their alleged interest in the land, such interest being a life interest of a third in the whole to the cross-plaintiff, James Snowball, and a third interest in fee simple to the plaintiff James B. Snowball, subject to said life estate, but upon condition of said plaintiff's returning \$1139.46 toward the purchase price paid by defendant, L. E. Moore, he recovering at the same time \$424 for his share of the rents, and upon condition of said cross-plaintiff's returning \$619.73 toward the purchase price paid by defendant, L. E. Moore, he at the same time recovering \$1,272 as his share of the rents. The judgment offset the rents against the return payments, and directed, as to the plaintiff, that he pay the balance remaining, with six per cent per annum interest thereon from date of judgment, into the registry of the court within ten days after filing of the mandate of the appellate court, if an appeal was taken, and as to the cross-plaintiff, that he recover the balance remaining in his favor from the defendant, L. E. Moore, with interest at six per cent per annum from the date of the judgment. The ²¹ verdict found that the defendant, L. E. Moore, was the owner in fee simple of the remaining undivided interest of said real estate, and the decree adjudged that partition be made in the usual manner, commissioners being appointed therefor, but to be so made that the defendant's improvements should go to her, if it could be done without prejudice to the interests of said plaintiffs.

"The material facts disclosed by the record are these: The property in controversy was the separate property of Mary A. L. Snowball, deceased, and at her death the fee simple title to same descended to and vested in her three children, Daisy Dean McKinney, Lilian E. Fisher, and the plaintiff, James B.

Snowball. The cross-plaintiff, James Snowball, is the surviving husband of said Mary Snowball, and upon her death became entitled as such survivor to an estate for life in one-third of said property. In 1898, after the death of Mrs. Snowball, the city of Houston brought suit against her heirs above named to recover taxes due said city upon said property and to foreclose the tax lien for same. On May 12, 1898, a judgment was rendered in said suit in favor of the plaintiff for the sum of \$1,572.30, and foreclosing the tax lien. In accordance with this judgment an order of sale was issued, and in pursuance thereof the property was sold on the first Tuesday in August, 1892, at public outcry before the courthouse door of Harris county. At this sale the appellant, L. E. Moore, became the purchaser for the sum of \$1,600, which amount she paid to the sheriff, and received his deed for the property. This deed is in the usual and proper form, and was duly recorded in the deed records of Harris county. Subsequent to this purchase at sheriff's sale the appellant procured from Mrs. McKinney and Mrs. Fisher a conveyance of their interest in the property. Notices of the sheriff's sale were posted as required by the statute, but no notice of same was served upon either of the appellees, both of whom lived in Harris county at that time. The property consisted of various lots and parcels of land, but the improvements thereon and the purposes for which the property was used were such as to prevent its being sold advantageously by separate lots. Notwithstanding this fact it was sold in separate parcels according to artificial lot lines. At the time of this sale the fair market value of the property was \$17,000. The homestead of appellee James Snowball had been established upon a portion of this property for thirty years, and he and the appellee James B. Snowball, who is a minor, were occupying said homestead at the time of the sheriff's sale, and continued to occupy same until dispossessed by the sheriff at the instance of the appellant. Neither of the appellees had any knowledge or notice of said sale until some time after it had occurred. Had they known of the sale they would have endeavored to secure the money to pay off the lien, and failing to do this they would have demanded a publication of notice of the sale in a newspaper and may have thereby obtained more bidders at such sale, and would have required the property to have been subdivided and sold with reference to the improvements and not by artificial lot lines. On ²² the 24th

of August, 1893, appellee James Snowball, for himself and as next friend of the minor appellee, brought a suit in the district court of Harris county against L. E. Moore, the appellant herein, the city of Houston and R. R. Anderson, sheriff of Harris county, to recover the identical property which is the subject matter of this suit. The petition in that suit, in addition to the usual allegations of a petition in trespass to try title, alleged that the judgment obtained by the city in the tax suit was void because no citation had been served upon the defendants in said suit. It was further alleged that said judgment and the order of sale issued thereon were void for the reason that the judgment and order of sale directed that the property be sold in bulk for the whole amount of taxes adjudged to be due thereon, notwithstanding a portion of said property was the homestead of plaintiffs and could not therefore be lawfully sold to satisfy the taxes due upon the remainder of said property. It was further alleged that the tax judgment and the proceedings had thereunder constituted a cloud upon the plaintiff's title. The prayer of the petition was for the cancellation and annulment of said judgment and all proceedings thereunder, and for a perpetual injunction against any attempt to enforce same, for the recovery of the title and possession of the property and for equity and general relief. To this petition the defendant, L. E. Moore, answered by general denial and plea of not guilty and by plea in reconvention in which she claimed title to the property in controversy, and prayed that the same be adjudged to her. Upon the trial of this case judgment was rendered by the district court that the plaintiffs take nothing by their suit, that the defendant recover the title and possession of the property, and that all the right, title and claim of plaintiffs in and to said property be divested out of them and vested in the defendant, L. E. Moore. This judgment was rendered on the 21st of November, 1898, and was never set aside or appealed from. In the suit in which this judgment was rendered neither the pleadings nor evidence raised the issue of the invalidity of the sheriff's sale under which the defendant claimed title to the property by reason of any irregularities in such sale, the only attack made upon the sale being incidental and dependent upon the alleged nullity of the judgment and order of sale issued thereon. No service of notice of the cross-bill or plea in reconvention set up by defendant in that suit was had upon the plaintiffs, and no guardian ad

litem was appointed to represent the minor plaintiff, James B. Snowball, in defense of such cross-bill, and no appearance or answer was filed therein, but the plaintiff James Snowball knew that said plea in reconvention had been filed in said suit.

“Upon the foregoing statement of the pleadings and evidence in the above styled and numbered cause pending in this court on appeal from the district court of Harris county, we respectfully certify for your decision the following question: Do the facts stated sustain the appellant’s plea of *res adjudicata*?”

In the former action the ultimate issue was one of title to the land ²³ in controversy. To sustain this plaintiffs charged that the judgment, and, in consequence, the sale founded on it, were void, leaving their title unaffected. As the judgment affected them in other ways than in its operation upon their title, they sought a judicial declaration of nullity against it, and against the sale as dependent on it. No attack was made upon the sale for any vice peculiarly affecting it. This was the utmost scope of that action. Whether the special allegations designed to show the invalidity of the judgment were sufficient or not they asserted no other cause of action. The answer and plea in reconvention raised no other issue but that of title made by the petition, and did not enlarge the scope of the issues: *Hoodless v. Winter*, 80 Tex. 638, 16 S. W. 427; *Shepard v. Cummings’ Heirs*, 44 Tex. 502. A finding that the judgment was not void necessarily led to a judgment in favor of the defendants. In the present proceeding the plaintiffs concede to the defendants all that was denied in the former, admitting that the judgment and sale were not void, and that the title passed to and is still in the defendants; and attack the sale upon grounds which affect it alone, and which would not have sustained a claim of title in plaintiffs, but simply entitle them to a judgment setting the sale aside and restoring their title upon compliance by them with certain equitable terms and conditions. Different evidence is necessary to sustain the two actions, and different judgments are applicable to them, one in favor of the plaintiffs in this case being entirely consistent not only with the correctness of that rendered in the former, but with any that might have been rendered therein on the issue of title had it been unrestricted by special allegations. That the relief now sought could have been obtained under the pleadings in the former action will not be claimed. On the other hand, it must be admitted that,

by appropriate pleading, the plaintiffs might have joined together the cause of action which they attempted to set up and that which they now assert, and by alternative prayer could have enforced the latter where they failed in the former. This is true partly because of the abolition of the distinction between law and equity and partly because of the liberal allowance in our law of the joinder of different causes of action, whether legal or equitable. Upon an issue of title the plaintiff or defendant may, of course, recover upon that which constitutes a title, whether it be legal or equitable; and it may be that in support of such an issue any title of either kind which the party has must be adduced. Judgment on the merits settles the title, and neither party will be heard afterward to say that he had a title which he did not adduce, whether his failure was due to the condition of his pleading or his evidence. But the attempt here is to set up that which was not a title, which was inadmissible in evidence upon the issue of title, and which constitutes, as it has been defined by the decisions of this court, a cause of action different from that formerly adjudicated. The question therefore is, Were the plaintiffs bound to assert it, because it was a right respecting the property sued for, and one which the law regulating joinder of actions permitted them to connect ²⁴ with their former action, or otherwise have it cut off by the judgment in favor of the defendants on the issue of title? It is claimed that they were, upon the principle so often and so broadly laid down that a judgment "is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause and which they might have had decided": *Foster v. Wells*, 4 Tex. 104; *Nichols v. Dibrell*, 61 Tex. 539; *Freeman v. McAninch*, 87 Tex. 132, 47 Am. St. Rep. 79, 27 S. W. 97. This we understand to mean only that all matters which properly belong to a cause of action asserted in the pending suit such as will sustain or defeat, in whole or in part, that cause of action, must be produced or be barred by the judgment, and not that all the different causes of action a party may have respecting the same property must be joined, because they may be, in one proceeding. To illustrate this, if the plaintiffs in the former suit could have shown some other title to the property, or that the judgment or sale was absolutely void for some other reasons than those set up, they could not now aver them, because the title and the nullity vel non of the judgment and sale were put in issue, and any-

thing that would have established either would have established plaintiffs' title; and they were bound to bring forward all such matters: *Werlein v. City of New Orleans*, 177 U. S. 390, 20 Sup. Ct. Rep. 682, 44 L. ed. 817. But to so apply this doctrine as to embrace within an adjudication of the title to property every cause of action which the party had at the time of its rendition respecting such property, when only one of them was set up, would, in view of the liberality of our law allowing joinder of actions, be equivalent to saying that but one suit about the same property can be prosecuted to judgment upon its own merits between the same parties, a proposition no one will assert. Under such a conception of the law a plaintiff who had been defeated in an action of trespass to try title would not be allowed afterward to show that that which he had supposed to be a title was only a mortgage, and to foreclose it, or that, though not entitled to recover the land, he was entitled to the enforcement of a vendor's lien, or to specific performance of an executory contract. For under our procedure a plaintiff, in doubt as to his true rights, might seek to recover land upon an allegation of title, and, in the alternative, to enforce any one of these supposed claims, or many others that might be instanced. Courts and text-writers have often found it necessary to so qualify the broad statement of the rule above quoted. In the case of *Aurora v. West*, 7 Wall. 102, 19 L. ed. 49, Mr. Justice Clifford thus states the doctrine: "Where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in *rem judicatam*." Says Freeman: "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject matter of the litigation, and every matter coming within the legitimate purview of the original action. ²⁵ The general expression, often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action is misleading. What is really meant by this expression is, that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. It may be that the plaintiff might have united other causes of action with that set out in his complaint, or that the defendant might have interposed counter-

claims, cross-bills, and equitable defenses, etc. But as long as these several matters are not tendered as issues in the action, they are not affected by it": Freeman on Judgments, 249; Black on Judgments, 732; Am. & Eng. Ency. of Law, 2d ed., 766, 775, 784. This we understand to be the true doctrine, and the principle that all matters are concluded that might have been litigated has not been differently applied by the judgments of this court in cases cited by appellants. The statement has always been made with reference to some matter that was comprehended within the issues in the former action, and not concerning causes of action distinct from those before asserted and adjudicated. If, as we have said, the matter now set up by plaintiffs constitutes a different cause of action from that which they formerly sought to maintain, they were not, under the authorities cited, bound to enforce it in their first action: Freeman on Judgments, 256. That it is such we think the decisions of this court leave no doubt. Nothing but evidence of title was admissible or could have been made admissible under the former issues without the introduction of a different cause of action: Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657; Haskins v. Wallet, 63 Tex. 213; Wallet v. Haskins, 68 Tex. 418, 2 Am. St. Rep. 501, 4 S. W. 596; Rippetoe v. Dwyer, 49 Tex. 498; Fuller v. O'Neal, 69 Tex. 349, 5 Am. St. Rep. 59, 6 S. W. 181; Chicago etc. Ry. Co. v. Titterington, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472; Rutherford v. Stamper, 60 Tex. 447; Fisher v. Wood, 65 Tex. 199. The substance of these decisions applicable here is that a right of action to set aside such a deed as that defendants held, not void, but merely voidable by direct attack and upon equitable terms, cannot be enforced under the pleadings in the action of trespass to try title. If that proposition is sound, and it is firmly established, it inevitably follows that such a right is not comprehended in the issue of title; for if it were it could, of course, be made effectual as a ground of recovery or of defense in such an action. While a plaintiff is permitted under our system to invest one proceeding with all the characteristics of both kinds of actions, and if he fail in one to recover upon the other, it is still true that the causes of action are distinct, the judgments applicable to them are different, and the allowance of one denies the existence of the other. A defendant, when sued in trespass to try title, may plead not guilty, thus making the issue of title, and may also plead specially such a right as that which plain-

tiffs here set up; but when he does so he, in substance, asserts in reconvention a different cause of action against the plaintiff from that which plaintiff asserts against him. If it were not so, his right would necessarily be available under his plea of not guilty. The case of *Bonker v. Charlesworth*, 33 Mich. 81, sustains the view ²⁶ which we have expressed: See, also, *Hills v. Sherwood*, 48 Cal. 386, and *Blanchard v. Brown*, 3 Wall. 245, 18 L. ed. 69. The two cases last cited illustrate the principle, but as the matters which it was held could be set up by bill in equity, to avoid a deed, after judgment in ejectment, could in this state be proved on the issue of title in an action of trespass to try title, it may be that the particular applications there given to the rule of *res judicata* would not be given here. But the rulings made in these cases do apply where, as in the present instance, the matter set up in the second action could not have been litigated in the issues of the first suit: *Williams v. Barnett*, 52 Tex. 130; *Catlin v. Bennatt*, 47 Tex. 165.

The plaintiffs, believing the judgment of foreclosure and sale against them to be void, leaving their title unaffected, brought suit to recover the land. Judgment was rendered against them adjudging the title to be in the defendant, because the judgment and sale were not void, but sufficient to pass the plaintiffs' title. They had asserted a cause of action which they did not have, simply mistaking the character of their right, and, therefore, their remedy. They now assert a different cause of action, which, we must assume for present purposes, they did have, but did not, because of their error, put in issue in their first proceeding. The former judgment was not on the merits of their real cause of action, so far as the certificate discloses, but was probably the result of their misconception of their remedy: *Freeman on Judgments*, 263, 265. With reference to this, the author says: "The second subdivision [in section 263] includes all judgments rendered on the ground that, conceding the plaintiff to have a cause of action upon which he is entitled to a remedy, yet he is not entitled to so recover under the remedy or form of action which he has chosen. The exceptions which takes these cases out of the general rules in relation to estoppel is a very important one, saving the plaintiff from the loss of his claim through any error of judgment on the part of his attorney in determining what form of action is best suited for the enforcement of the plaintiff's rights."

There is at the foundation of appellant's whole contention the mistaken assumption that, because plaintiffs had but one cause of action with respect to this land, it follows that it was set up in the previous action and was the subject of the former adjudication, when the truth is that their real cause of action was never asserted, and therefore never adjudicated. That which they did allege was a cause of action which they did not possess, and that they did not possess it was the matter determined against them. The effect of that judgment must be determined by inquiring, not what was the character of the cause of action respecting the land which they really had, but what was the character of that which they set up and put in issue; and the judgment declaring that they did not have that which they set up cannot with justice be applied to one which they had but did not set up.

It seems to be supposed that the case is affected by article 5275 of the Revised Statutes, which provides that a judgment in an action of trespass ²⁷ to try title "shall be conclusive as to the title or right of possession established in such action." There is no contention that the judgment is not conclusive as to the title and right of possession. The proposition here is that the title is held subject to any right of plaintiffs which was not and could not have been adjudicated within the scope of the action of trespass to try title in which it was rendered. Such a right is not a title judicable in that action. There is nothing new in the proposition that one party may have title and right of possession and yet hold the property subject to equitable rights of another and duties of his own which may and must be enforced in proceedings other than actions involving only title and right of possession: *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550. Such a right and corresponding duty are asserted by plaintiffs, and as it was not determinable in the former action it was not cut off by the judgment therein.

We answer that the facts stated do not sustain the plea of *res judicata*.

Mr. Justice Brown Dissented and expressed the view: "That the present suit is based upon the same cause of action as the former; that is, the right of the plaintiff to the title and possession of the same tract of land which was the subject of the former suit, charging the wrong of the defendant to be a withholding from the plaintiff of the title and possession of that land, with a prayer for a recovery of the land and the title thereto. The petition set up the facts as to the

rendition of the judgment, the issuing of the order of sale and the sale, and sought to annul the title of the defendant by having the sale itself set aside on account of the irregularities charged to have occurred in executing the order of sale. The facts alleged in the petition in this case are identical in every material point with those alleged in the former suit, except that it contains no allegation distinctly marking it as an action of trespass to try title, and avers, as cause for setting aside the sale under which the defendant claimed, the irregularity in the act of selling instead of the complaints which were made in the petition in the former case, all of which causes existed when the former suit was commenced. The object in each case was the recovery of the land. If the allegation made in the petition in the second suit, that the defendant had acquired the legal and equitable title to the land, and the offer to pay to the defendant moneys paid out in discharging the lien upon the land be stricken out, the petitions are practically the same, and each would constitute an action of trespass to try title. It seems to me plain that the cause of action in the second case is the same as in the first, and that the variation in the pleading applies alone to the means by which the plaintiff sought to set aside the defendant's title. . . .

“The concession that the former judgment was conclusive upon the title to the land carries with it the admission that the title was put in issue by the pleadings in that case, because a judgment will not conclude parties on an issue not made by the pleadings. The title being in issue, every fact pertinent to that issue should have been presented in that case, and whether pleaded or not is barred; otherwise it was in the power of the plaintiffs to have as many actions against the defendant as there were grounds of attack upon the judgment, order of sale and sale: *Patterson v. Wold*, 33 Fed. 793; *Farwell v. Brown*, 35 Fed. 811; *Rogers v. Higgins*, 57 Ill. 244; *Kelly v. Donlin*, 70 Ill. 378; *Ruegger v. Indianapolis etc. Ry. Co.*, 103 Ill. 449; *Springer v. Darlington*, 198 Ill. 121, 64 N. E. 709; *Kurtz v. Carr*, 105 Ind. 574, 5 N. E. 692; *Wildman v. Wildman*, 70 Conn. 700, 41 Atl. 1. The facts of the last case cited were, that the plaintiff had before instituted suit against defendant to cancel a deed to land which he alleged he had never executed or delivered to defendant. Judgment was entered against plaintiff, and he instituted this suit to cancel the same deed upon the ground that it was executed without consideration and was not intended to vest title in defendant. The former judgment was pleaded in bar, and the court said: ‘The inspection of the record also discloses that the different causes by which the invalidity of the deeds is shown were both known to the plaintiff before he brought the former suit, and that by proper care both might have been shown on the former trial. A single cause of action cannot be split in two. If the plaintiff’s complaint in the former action was so framed that he could not avail himself of all the evidence which

he had to prove his right to recover, and so suffered defeat, it may be his misfortune.' The first action was based on a ground that did not exist in fact, but the judgment was held to be conclusive of the ground not pleaded. All of the cases cited support that doctrine, and I have found none to the contrary.'"

A Judgment of One Court, it is declared in the recent case of *Rew v. Independent School Dist.*, 125 Iowa, 28, 106 Am. St. Rep. 282, is conclusive in an action between the same parties not only as to the same cause of action, but as to other causes involving the right or title asserted and the defenses interposed in the previous action; and not only as to those matters expressly determined, but also as to those matters collaterally involved and necessarily determined in reaching the final judgment. See, too, *Black v. Boyd*, 211 Ill. 290, 103 Am. St. Rep. 200, and the cases cited in the cross-reference note thereto; *Barnes v. Huntley*, 188 Mass. 274, ante, p. 462.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY v. SMITH.

[98 Tex. 47, 81 S. W. 22.]

DAMAGES—Release of Claim—Consideration.—A release by an injured employé of his claim for damages in consideration of his re-employment, there being no promise to re-employ, wants consideration and cannot be enforced. (p. 611.)

DAMAGES—Release of Claim—Consideration—Re-employment. A promise to re-employ an injured employé "for such time only as may be satisfactory," followed by actual re-employment and the payment of wages, is not a sufficient consideration for the employé's release of a claim for damages arising prior to his re-employment. (pp. 612, 613.)

T. S. Miller and Thomas & Rhea, for the appellant.

Clark, Mathis & Freeman, for the appellee.

⁴⁹ WILLIAMS, A. J. Certified question from the court of civil appeals of the third district, as follows:

"This suit was instituted by the appellee to recover damages alleged to have been sustained on account of the negligence of the Missouri Kansas and Texas Railway Company of Texas, on or about the nineteenth day of August, 1902, and resulted in a judgment for appellee in the sum of nineteen hundred and sixty-five dollars.

“Among other defenses the appellant alleged as follows:

“ ‘5. This defendant says that at the time of the alleged accident to the said plaintiff, it had in force among its employes a rule and regulation, which was well known to all of its employes, by virtue of which, if an employé was injured, he was not allowed to return to work for this defendant unless he settled his claim for such injury or signed a release to said defendant for such injury.

“ ‘That after the plaintiff was injured, he, the said plaintiff, in order to return to work and secure employment from this defendant, for and in consideration of re-employment by this defendant, by written release duly executed, he, the said plaintiff, discharged this defendant from all liability on account of said alleged accident, and after the execution of said release he, the said plaintiff, was employed by this defendant and worked for this defendant for — days, for which he was paid, ⁵⁰ and on, to wit, the — day of —, A. D. 1902, voluntarily left the service of this defendant.

“ ‘Wherefore, this defendant says that whatever claim that this plaintiff may have had against this defendant has been fully adjusted and settled.’

“By supplemental petition the plaintiff under oath made the following plea:

“ ‘2. Specially replying to that part of said answer which attempts to set up a release by plaintiff of defendant’s liability to plaintiff for his said injuries, plaintiff admits that he signed a paper of some kind, that he signed the same under the following circumstances: That in about fifteen or twenty days after he was hurt, thinking that he had sufficiently recovered to return to work, he went back to resume his work, when Mr. Allen, defendant’s foreman, told plaintiff that he could not return to work unless he signed a release, and told plaintiff to go and see Mr. Brunet; plaintiff says that he went to see Mr. Brunet, defendant’s agent, and told him that Mr. Allen said that he would have to sign a release before he could return to work; that said — handed plaintiff a paper and told him to sign it, which he did. That he never read the same, nor was it read to him by anyone; that he did not know what it was nor what it contained. Plaintiff states that defendant did not pay him anything for signing same.

That if he signed a release discharging defendant of liability to him, the same was and is wholly without consideration; plaintiff further states that he had no knowledge of the fact that defendant had a rule requiring its employés to sign a release discharging defendant from liability before they could return to work after getting hurt until defendant filed its answer herein. Plaintiff further states that he attempted to go to work, but his head hurt him so badly he could not work, and he has not been able to work since he was hurt.'

"There was evidence in the case which would support the finding of the jury that the plaintiff was injured in the sum found by the jury.

"There is a conflict of evidence as to the date when the injury was received, the plaintiff and his witnesses testifying that the accident occurred on the 19th of August, 1902, and the defendant's witnesses, that he was hurt on the night of July 7th.

"Appellant offered in evidence the following release:

" 'The Missouri, Kansas and Texas Railway Company of Texas. Whereas, on or prior to the 8th day of July, 1902, I, the undersigned J. W. Smith (col.), of Dallas, was an employé of the Missouri, Kansas and Texas Railway Company of Texas, and as such employé was engaged as coal heaver.

" 'Whereas, on or about the 8th day of July, 1902, aforesaid, I, the undersigned, received personal injuries whilst in the service of said company at or near Dallas, caused as follows: struck by handle of coal bucket; for which such injuries and damage resulting to me therefrom ⁵¹ I claim to have a demand against the said Missouri, Kansas and Texas Railway Company of Texas; and

" 'Whereas, said claim and demand has been compromised and adjusted by and between myself and said company.

" 'Now, therefore, in consideration of re-employment by said company, for such time only as may be satisfactory to said company, I do hereby acknowledge full settlement, payment and satisfaction of all claims and demands against said company for the injuries and damages aforesaid, and do hereby release and discharge said company from any

and all claims of whatever kind or character I may have on account of or arising from said injuries.

“ ‘Witness my hand, this 14th day of July, 1902.

“ ‘J. W. SMITH.’

“The same conflict in evidence occurs with reference to the date when this release was executed. The evidence, however, shows that the release was signed after the plaintiff was injured, whether the date of the accident was in July, as claimed by appellant, or in August, as claimed by appellee.

“There is evidence which would have warranted the jury in finding that after the plaintiff was injured he sought re-employment with appellant, and that the agent of appellant told him that he could not work for appellant again unless he signed a release; and that appellee thereupon went to another agent of appellant, and, for the purpose of obtaining re-employment, executed the release above set out, and that he then proceeded to work for appellant for some time, and received wages therefor.

“There is also evidence which tends to show that there was a rule of appellant which prevented employes who had been injured from being re-employed unless a release was executed by them for all damages sustained by them, and that appellee was informed of said rule before he executed said release and obtained said re-employment.

“Among other instructions, the court charged the jury as follows: ‘You are instructed that the instrument offered in evidence as a release to defendant of all liability on account of the accident in question was without consideration; and you will therefore not consider the same in arriving at your verdict.’

“Under a similar state of facts, the court of civil appeals for the fifth district, in the case of *Carroll v. Missouri etc. Ry. Co.*, 30 Tex. Civ. App. 1, 69 S. W. 1004, decided that the contract was not without consideration. We entertain some doubt as to the correctness of this decision, and for said reason, and for the further reason that this case will have to be reversed for other errors in the record, we therefore certify the following question: Did the court err, under the facts stated, in instructing the jury

peremptorily that the release offered in evidence was without consideration?" The question is answered in the negative.

⁵² When the release was executed there was no promise on the part of the defendant to re-employ plaintiff at all, nor any another consideration to support plaintiff's promise, and hence no contract binding on either party arose. So far, the case of Gulf etc. Ry. Co. v. Winton, 7 Tex. Civ. App. 57, 26 S. W. 770, decided by the court of civil appeals for the second district, whose decision was and is approved by this court, is decisive. From the opinion of the court of civil appeals in that case, which was all that was presented in the application of this court for a writ of error, it appears that no other consideration was shown than that recited in the instrument passed upon, viz., employment of the releasor to be given by said company, "for such time and in such capacity as may be satisfactory to said company, and not longer or otherwise." Hence this court cannot be said to have passed upon the additional question presented in this case, and in the one referred to in the certificate, decided by the court of civil appeals for the fifth district, arising out of the fact that employment was given after the execution of the release. We have concluded that such fact, as it appears in the certificate, does not constitute a consideration to support the release. As we have said, there was no promise on the part of the defendant to employ at all, hence there was originally no mutuality of obligation. Had there been an absolute promise to employ, in the terms of the release, "for such time only as may be satisfactory to said company," it would have been too uncertain to be enforceable, because the time of employment would have been wholly optional with the defendant, and therefore would not have afforded a consideration for the release.

The case is not the same as those in which there is a promise to employ and in which no time is fixed and no option reserved. In such cases some authorities would hold that, if the person to be employed has rendered a consideration for such a promise, he acquires the option of fixing the term of employment (East Line etc. Ry. Co. v. Scott, 72 Tex. 70, 13 Am. St. Rep. 758, 10 S. W. 99, and

cases cited); and others that he acquires the right to employment for a reasonable time. Under either view such authorities hold that there would be a valid contract. Both of these views are excluded by the defendant's reservation of the option, which, as we have said, would have destroyed all mutuality in the alleged contract, and left the release without consideration, even had there been a promise on defendant's part to employ according to its terms.

The question then remains, Did the actual employment and payment of wages, "for some time," supply the consideration which was originally lacking? It is claimed that it did upon a principle that has been applied in a great number of cases, and which is thus stated by standard writers: "A contract is often such that until something is done under it, the consideration is imperfect, yet a partial performance or complete performance on one side supplies the defect. If for example one promises another, who makes no promise in return, to pay ⁵³ him money when he shall have done a special thing, if he does it, not only is the contract executed on one side, but also the consideration is perfected and payment can be enforced": Bishop on Contracts, sec. 87. "A contract arises upon executed consideration when one of the two parties has, either in the act which amounts to a proposal or the act which amounts to an acceptance, done all that he is bound to do under the contract, leaving an outstanding liability on one side only": Anson on Contracts, 116; *Heisch v. Adams*, 81 Tex. 94, 16 S. W. 790. This principle is usually applied in cases in which the only original defect in the negotiation was that it was left optional with one of the parties whether or not he would do the thing contemplated by the other as the consideration of his promise, that which was to be done, if the party chose, being, however, sufficiently definite to enable the court to see, after it had been done, that the intended consideration had been rendered. In such cases the original objection of want of mutuality is removed by actual performance. The authorities go further and hold that where a particular definite thing is to be done by the promisee and he enters upon the performance, that fixes the obligations and binds both parties to carry out the contract: *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. 1015. The

principle might have application here if the terms of the stipulation had been such that the time of employment could be legally ascertained. In that case, by entering upon performance the defendant would, perhaps, have removed the objection that it was not originally bound to employ at all, and all the terms of the contract would have become fixed. But here there is another difficulty, which still remains, consisting in the fact that the time of employment was left optional with the defendant and the fact of employment did not bind it and therefore could not bind plaintiff to anything. With the parties thus situated, how could it be said that the defendant had performed or commenced the performance of that which was stipulated to be the consideration of plaintiff's promise, when the consideration is not agreed upon? The only answer that can be made is that any employment which defendant might choose to give was the consideration stipulated for, and this was furnished, which throws the question back upon the very uncertainty that affected the transaction originally. If upon employment the parties became bound, to what were they bound? The so-called contract furnishes no answer. Cases analogous to this are those in which a promise is made to obtain forbearance from a creditor to his debtor. The authorities hold that in order to bind either party the forbearance stipulated for must be for a time sufficiently definite to enable the court to ascertain it. They differ as to what constitutes sufficient definiteness, but they hold that a promise made upon consideration of forbearance for a time left entirely optional with the creditor is without consideration, although indulgence may, in fact, be given. In *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330, a husband gave a note and his wife indorsed it, for an antecedent ⁵⁴ debt of the husband to the payee, and it was claimed that the consideration for the wife's obligation was indulgence extended to the husband. There was, in fact, forbearance for two years. But the only promise of the creditor was that he would hold the note until he wanted the money. Said the court: "It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have

fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it." This reasoning applies here. Defendant upon employing plaintiff could, under the right expressly reserved, have discharged him at once without violating any agreement. Employment for the time plaintiff remained in defendant's service might have been a sufficient consideration for his release, as forbearance for the two years in the New York case would certainly have been for the wife's promise, had the contract so stipulated. But "nothing is a consideration that is not regarded as such by both parties. To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one: *Fire Ins. Assn. v. Wickham*, 141 U. S. 564, 12 Sup. Ct. Rep. 84, 35 L. ed. 860, and authorities cited.

It is laid down in many authorities that original uncertainty in a contract may be cured by action of the parties under it, as where they have acted upon and executed it according to their understanding and intentions: *Alabama etc. R. R. Co. v. South. etc. R. R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401, 3 South. 286. It is perhaps possible that such a state of facts might arise from action upon such an agreement as that in question as to call for the application of this principle. Nothing of the kind appears from the certificate, which states only the fact that plaintiff was employed and received wages for some time after the execution of the release. It is suggested that the release should be construed to mean that the employment was to be for so long a time as plaintiff's services were "satisfactory" to defendant, and that, thus understood, the stipulation is good. Whether or not such a construction would make it good need not be determined, for it is plain that the language has the meaning which we have attributed to it.

CONSIDERATION FOR RELEASE OF CLAIM FOR DAMAGES FOR PERSONAL INJURIES.**I. Adequacy of Consideration, 615.****II. Promise of Re-employment.****a. Release Without Promise, 616.****b. Promise to Re-employ for Definite Time, 616.****c. Re-employment for Indefinite Term, 618.****I. Adequacy of Consideration.**

A release given by a servant to his master of his claim for damages for personal injury received through the negligence of the master, if fairly obtained and understandingly executed, constitutes an effectual bar to the servant's recovery for the injuries, although the contract of release is improvidently made and the servant receives but a trifling sum therefor: *Missouri Pac. Ry. Co. v. Goodholm*, 61 Kan. 758, 60 Pac. 1066. A release from, and settlement of, a claim for personal injuries, will not be set aside merely because improvidently made: *Barker v. Northern Pac. Ry. Co.*, 65 Fed. 460. Where a release from, or compromise of, a disputed liability for personal injuries has been deliberately entered into by the parties, it will not be set aside except upon the most satisfactory proof of a want of consideration: *Chesapeake etc. Ry. Co. v. Mosby*, 93 Va. 93, 24 S. E. 916. An instrument executed by a passenger releasing a conductor and the railroad company from all liability for damages incurred by reason of the conductor having put such passenger off the train to her injury, is binding on such passenger, in the absence of fraud, and precludes her from recovering any damages against the railroad company for her eviction, although such release was executed on a very inadequate consideration, and solely out of motives of kindness for the conductor to prevent him from losing his position: *Illinois Cent. R. R. Co. v. Heath* (Ky.), 80 S. W. 502.

A contract providing that in consideration of regular wages during disability, necessary nurse hire and all doctor bills, resulting from present disability, and employment when recovered, an injured employé releases his employer from liability for the injury, if accepted and acted on by the employer, though signed by the employé alone, constitutes a contract binding on both: *American Quarries Co. v. Lay* (Ind. App.), 73 N. E. 608. Or if a servant having received personal injuries while in the employ of his master, resulting from alleged negligence on the part of the latter, executes to his master a release of all claim for damages resulting from such injuries in consideration of payment by the master of his doctor bills and of his salary during the time he is disabled, such release is a complete bar to the recovery of damages for such injuries: *Jennings v. City of Fort Worth*, 7 Tex. Civ. App. 329, 26 S. W. 927. It has, however, been held that where a railroad company negligently inflicts a personal injury on one of its employés, and thereupon has him treated by its surgeon, and pays

the latter therefor, at the request of the injured employé, such treatment and payment constitute no consideration for a release by such employé to the company for all damages caused by the injury: *Richmond etc. R. R. Co. v. Walker*, 92 Ga. 485, 17 S. E. 604. In this case the court said that such a contract of settlement would be a "nudum pactum, or naked agreement, without any valid consideration because of no advantage, legal or equitable, to the plaintiff, and it would not bar his legal right to maintain this suit": *Richmond etc. R. R. Co. v. Walker*, 92 Ga. 485, 17 S. E. 604. Under the same principle it has been held that an agreement by one injured while in the employ of another to receive in satisfaction of his claim for both wages and damages, the wages to which he is entitled by his contract of hiring, and concerning which there is no dispute, is, as to the claim for damages, without consideration and void: *Carlton v. Western etc. R. R. Co.*, 81 Ga. 531, 7 S. E. 623.

II. Promise of Re-employment.

a. **Release Without Promise.**—As announced in the principal case, it is undoubtedly true that a release of his claim of damages by an injured employé in consideration of re-employment by the same master, where there is no promise to re-employ, is without consideration and void. This is the rule as announced in *Purdy v. Rome etc. R. R. Co.*, 125 N. Y. 209, 21 Am. St. Rep. 736, 26 N. E. 255, where it appeared that an employé was injured while in the discharge of his duties through the alleged negligence of his master, and in an action by him to recover damages, the master gave in evidence a paper signed by the employé, by the terms of which, in consideration of his employment, he agreed that his master should in no case be liable for any damage to him by reason of negligence. It appeared that the injured employé was, at the time of the execution of the instrument, and had for some years prior thereto been, in the employ of the defendant, and that his original employment was a general one and for no particular time. The employé signed the release without compulsion and thereafter continued in the same employment, and for the same compensation as before, and no new employment was tendered to, or accepted by him, nor was there any promise that the employment he was then engaged in would be continued, nor was its execution made a condition of continued employment, and no consideration was actually paid therefor. Under such conditions it was decided that the release was void for want of consideration: *Purdy v. Rome etc. R. R. Co.*, 125 N. Y. 209, 21 Am. St. Rep. 736, 26 N. E. 255.

b. **Promise to Re-employ for Definite Time.**—The authorities establish the rule that a release of his claim for damages by an injured employé, in consideration of his re-employment by his master for a definite time, no matter how short that period may be, is supported by a sufficient consideration. Thus, a contract between a rail-

way company and its employé by which the latter releases all claim and demand against his employer for personal injury in consideration of one dollar and re-employment for one day certain, and beyond that only at the will of the employer is valid and binding: *Quebe v. Gulf etc. Ry. Co.*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734. In this case the court said: "No circumstance of undue influence or over-reaching is shown. So far as appears, plaintiff acted freely and voluntarily in making the settlement. The consideration was a valuable and legal one, though small. Considering the fact that the matter settled was regarded by both parties as involving no large amount, it cannot be said that the smallness of the consideration by itself furnishes ground for disregarding the release. From the written contract and the verdict of the jury it appears that plaintiff chose to accept what was offered and release his cause of action, and no ground for relieving him is made to appear": *Quebe v. Gulf etc. Ry. Co.*, 98 Tex. 14, 81 S. W. 20, 66 L. R. A. 734. A verbal promise by a railroad company to give to an employé, who was injured while performing his duties, "steady and permanent employment," in consideration of a written release executed by the latter, discharging the company from all liability arising out of the injury, is not void for uncertainty and indefiniteness to the time of employment, but is an agreement to retain the employé as long as the latter is able, ready, and willing to perform such services as the company may have for him to do: *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802. And taking a discharged employé back into service at fixed wages, with a promise of steady employment, is a sufficient consideration for the release by such employé of a claim for damages for injuries arising out of the negligence of his employer prior to such discharge. If such employé is afterward discharged without cause, his remedy is upon such promise and agreement: *Hobbs v. Brush Electric Light Co.*, 75 Mich. 550, 42 N. W. 965.

If a person having received permanent injury in the service of his employer, and claiming that the injury was caused by the negligence of the latter, in consideration of an agreement on the part of the employer, to give him work so long as he gives satisfaction to the foreman or superintendent under whom he works, releases his claim for damages for said injury, and is then given employment in pursuance of the agreement, at wages agreed upon between them, there is no lack of consideration, certainty or mutuality in the agreement, all its terms are settled, and by releasing his claim for damages, the employé has paid in advance for the option to do such work for his employer, as he is able to do, and he cannot be discharged without cause, and if in such case he is discharged, he may treat the contract as absolutely broken by the employer, and in an action thereon recover the full value of the contract to him at the time of the breach: *Rhoades v. Chesapeake etc. Ry. Co.*, 49 W. Va. 494, 87 Am. St.

Rep. 826, 39 S. E. 209, 55 L. R. A. 170. If a brakeman employed by a railroad company is injured through its negligence, while performing his duties, and the company in consideration of a written release signed by such brakeman, discharging the company from liability, pays him a sum of money, and promises verbally, to give him steady and permanent employment at a stated compensation, such payment and promise are acknowledgments of the company's liability, and the release is a good consideration for the verbal promise. Hence, if the company breaks such promise by discharging the injured employé without cause, the latter may maintain an action for damages for breach of the contract founded on the company's parol promise: *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802.

The case last cited was approved in *Harrington v. Kansas City Cable Co.*, 60 Mo. App. 223, where it was held that when the terms of a contract were that the employment should be steady and constant as long as the injured employé should properly do the work, and was based on a consideration consisting of a release for damages for personal injuries, the consideration is sufficient and the contract cannot be terminated at the will of the employer, but only according to its terms.

c. **Re-employment for Indefinite Term.**—Upon the question as to whether a release of his claim for damages by an injured employé in consideration of his re-employment for an indefinite period or "for such time only as may be satisfactory" is such a consideration as will render the release valid and binding, and whether actual re-employment in fulfillment of the promise will support the consideration for the contract and release, the cases are far from harmonious. In Texas the question has been decided both ways, as a reference to the principal case will show, wherein several prior cases holding contrary to the rule there laid down are disapproved. Perhaps the better rule and the one which must eventually prevail is that laid down in the principal case, namely, that a promise to re-employ an injured employé for an indefinite time or such time only as may be satisfactory to the employer, even if acted upon by an actual re-employment for some period, is too indefinite to furnish a consideration for the release given by such employé of his claim for damages for a personal injury. The doctrine of the principal case is approved and followed in the late Texas case of *Gulf etc. Ry. Co. v. Minter* (Tex. Civ. App.), 85 S. W. 477, where it is held that an agreement by an injured employé to release a claim against his employer for personal injuries sustained while the relation of master and servant existed between them, in consideration of re-employment by the master for such time and in such capacity "as may be satisfactory to the latter," and not longer or otherwise, is void for want of consideration, as the master's promise is too indennite and uncertain to be enforceable.

In *Potter v. Detroit etc. Ry. Co.*, 122 Mich. 179, 81 N. W. 80, 82 N. W. 245, the conclusion was reached that a release given by a brakeman to a railroad company, reciting that he had received certain injuries, and that, to avoid litigation, he, in consideration of re-employment by the company for such time as might be satisfactory to it, released it from all claim for damages for such injuries, was without consideration, where the servant was at the time the release was given in the employ of the company. In a late case decided by the court of appeals of Kentucky it was determined that where an employé sustained serious injury, and under a custom of the employer to retain in its service injured employés only when they signed releases for their injuries, executed a release for a nominal consideration, but for an actual consideration of being retained in such employer's service, and the employé was discharged the day after he resumed his labor on a fictitious charge, under a design conceived prior to the execution of the release and the resumption of the labor, the consideration for the release failed, and the employé was entitled to sue for his injuries: *Illinois Cent. R. R. Co. v. Keebler* (Ky.), 84 S. W. 1167.

In *Gulf etc. Ry. Co. v. Winton*, 7 Tex. Civ. App. 57, 26 S. W. 770, the court held that a release to a master from liability for personal injury received by an employé must be supported by a consideration, and that a stipulation for re-employment for such time as might suit such master is not a sufficient consideration to make such release binding. This, of course, is the doctrine of the principal case and the later case of *Gulf etc. Ry. Co. v. Minter* (Tex. Civ. App.), 85 S. W. 477. In *Texas etc. R. R. v. Sullivan*, 20 Tex. Civ. App. 50, 48 S. W. 598, however, it was decided contrary to the doctrine of the cases before cited, that the re-employment of an injured servant is a sufficient consideration for the latter's release of his claim for damages on account of personal injury, although he does not exercise his right to fix a reasonable time for the employment to continue, and thus put it out of the power of the employer to discharge him arbitrarily. And again in *Carroll v. Missouri etc. Ry. Co.*, 30 Tex. Civ. App. 1, 69 S. W. 1004, it was held that while a release of claim for damages for injuries received, executed in consideration of an agreement by a railway company to give employment to such injured person "for such time only as may be satisfactory to said company," does not of itself show a consideration such as would bar a recovery for such injuries, yet where the company has given the injured person employment under such agreement and release, this will constitute a sufficient consideration therefor and bind the employé. This case is expressly disapproved and overruled by the principal case. Outside of Texas only one case is found holding that the re-employment of a servant, who has been injured, is a sufficient consideration to support a relinquishment by him of all claim for damages against his em-

ployer on account of such injuries, though his contract of re-employment is vague, and indefinite in duration, and subject to termination at the will of the employer. The case referred to as thus holding is *Forbs v. St. Louis etc. Ry. Co.*, 107 Mo. App. 661, 82 S. W. 562.

HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY v. EAST.

[98 Tex. 146, 81 S. W. 279.]

WATERS—Percolating—Right to.—The owner of land has the right to collect by means of wells, and to use without limitation as to amount, waters percolating beneath his land, although he thereby drains the well of an adjoining owner to the injury of the latter. (pp. 622, 623.)

WATERS—Percolating—Right to.—The owner of land can use all the water he can obtain thereon by digging wells which are supplied by water percolating through the soil, provided such wells are not dug for the purpose of maliciously injuring adjoining proprietors, and this though such owners may be entirely deprived of water which would otherwise have percolated into their own land. (p. 625.)

Baker, Botts, Baker & Lovett and Head & Dillard, for the plaintiff in error.

P. Morris and Mosley & Eppstein, for the defendant in error.

¹⁴⁷ WILLIAMS, A. J. This case is thus stated by the court of civil appeals:

“This is a suit by W. A. East against Houston and Texas Central Railroad Company for damages growing out of the alleged destruction by defendant of plaintiff’s well. The case was tried before the court without a jury and resulted in a judgment for defendant and plaintiff appealed. The trial court filed conclusions of fact which, in the absence ¹⁴⁸ of a statement of facts, are to be taken as the facts of the case. Said conclusions are as follows:

“ ‘1. The defendant, the Houston and Texas Central Railroad Company, was the owner in fee simple of six (6) lots in the city of Denison, Grayson county, Texas, at the time mentioned in plaintiff’s petition, and dug thereon a well twenty (20) feet in diameter and sixty-six (66) feet deep. It put therein a steam pump of sufficient strength to sup-

ply a three-inch pipe, and with the exception of three or four days since August, 1901, has daily taken from said well by means of said pump about twenty-five thousand (25,000) gallons of water. This water was taken from said well and used by it in its locomotives and machine-shops operated by it in the city of Denison, in which said land is situated. Said well is supplied entirely by water percolating through its soil and that of adjacent lands and not by any underground or other stream of any kind. Before digging said well defendant made an examination of its surroundings, including the well of the plaintiff, and made test holes with a view of obtaining the desired supply of fifty thousand (50,000) gallons of water per day. Plaintiff was present when such examinations were being made and consented for his well to be examined by defendant, and had no further conversation or communication with the defendant upon the subject. From the examination made by it defendant became satisfied that it could procure the desired supply of water upon the land as aforesaid, and dug said well for purposes of obtaining the same for the uses hereinbefore set out. The wells were dug without any intention on the part of defendant of injuring the property of either of the plaintiffs, and it did not know that such would be the effect. The water percolated into defendant's well at different depths, some of it coming into the bottom thereof. The well of plaintiff is about five feet in diameter and about thirty-three feet in depth; is on land owned by plaintiff in fee simple and used as a homestead by plaintiff; was dug prior to defendant's well; and had always been used by plaintiff, up to the time defendant's well was dug, for household purposes, and prior to that time had always supplied an adequate supply of water for such uses; that this well has been dried up by the digging and use to which defendant has put its well. That the damage that plaintiff and his land has sustained by the drying up of his well is the sum of two hundred and six dollars and twenty-five cents (\$206.25), including both past and prospective injury to himself and the lots described in his petition.

“ ‘2. I further find that the use to which defendant puts its well was not a reasonable use of their property as land, but was an artificial use of their property, and if the doc-

trine of reasonable use, as applicable to defined streams to such cases, this was unreasonable.'."

The court of civil appeals reversed the judgment of the district court in favor of the defendant and rendered judgment for plaintiff for the damages claimed. We are of the opinion that this judgment is wrong and that of the district court right.

¹⁴⁹ Since the decision in the case of *Acton v. Blundell*, 12 Mees & W. 324, 13 L. J. Ex. 239, the law as therein laid down, so far as it controls this case, has been recognized and followed in the courts of England, and probably by all the courts of last resort in this country before which the question has come, except the supreme court of New Hampshire: *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. That doctrine is thus stated: "That the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action." The arguments in favor of the application to such cases of the doctrines applicable to defined streams of water were thoroughly presented at the bar in *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Ex. 239, and the reasons for the conclusion of the court against such application were carefully stated in the opinion. In all that has been said in subsequent discussions little, if anything, has been added to the arguments of counsel and of the court in that case: *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Ex. 239; *Chasemore v. Richards*, 7 H. L. Cas. 349, 29 L. J. Ex. 81, 5 Jur., N. S., 1873, 7 Week. Rep. 685; *Frazier v. Brown*, 12 Ohio St. 294; *Miller v. Blackrock Springs Imp. Co.*, 99 Va. 747, 86 Am. St. Rep. 924, 40 S. E. 27.

The many other authorities on the subject are cited in the cases referred to, and so thorough has been the discussion that we feel that it would be useless to attempt any addition. The practical reasons upon which the courts base their conclusions fully meet the more theoretical view of the New Hampshire court and satisfy us of the necessity

of the doctrine. Those reasons are thus summarized by the supreme court of Ohio in *Frazier v. Brown*, 12 Ohio St. 294: "In the absence of express contract and a positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: 1. Because the existence, origin, movement and course of such waters, and the causes which govern and direct their movements, are so secret, occult and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would therefore be practically impossible; 2. Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage of agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility."

The mere quantity of water taken by the owner from his land has nowhere been held to affect the question. Exhaustion resulting from excavating and pumping for mining purposes has been considered in several cases to give rise to no liability. So the authorities generally state that the use of the water for manufacturing, brewing and like purposes ¹⁵⁰ is within the right of the owner of the soil, whatever may be its effect upon his neighbor's wells and springs.

In *Chasemore v. Richards*, 7 H. L. Cas. 349, 29 L. J. Ex. 81, 5 Jur., N. S., 1873, 7 Week. Rep. 685, the defendant, in supplying the wants of a town, used to such an extent the water which had percolated through his land into a water-course as to reduce the water in the stream and to leave the plaintiff's mill thereon without adequate power, and yet it was held that there was no liability. There is possibly a conflict which we need not undertake to resolve between this decision and those in the two New York cases stated below. But in *Chasemore v. Richards*, Lord Wensleydale, who alone, among several delivering opinions, expressed doubt as to the correctness of the conclusion reached, admitted the soundness of the principle laid down in *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Ex. 239,

and that the owner of the soil is at liberty to dig therein and take away the percolating water for any legitimate purpose of his own, "even though they carried on trades requiring more water (breweries for example) than would be used for domestic purposes only; it would still be for their purposes only." His doubt arose out of the fact that the defendant was not using the water for his own purposes but was selling it to others. If persons using lands in mining, manufacturing and brewing may take therefrom all the water required in the prosecution of such businesses, what reason can exist why a railroad company may not do the same thing for such purposes as those to which it applies this well? We think none can be given. In the case of *Hougan v. Milwaukee etc. Ry. Co.*, 35 Iowa, 558, 14 Am. Rep. 502, the doctrine was applied to a situation like that shown by the facts of this case, except that there the railway company had only the right of way over, while here it owns the fee of the land; a difference in favor of this defendant. The decision is useful in establishing the proposition that such uses of water by railway companies are legitimate and proper uses in the sense of the rule we are considering. The other question, upon which the court was more doubtful, viz., whether or not such a company, with only a right of way over the land, has the right to thus draw the water from it, is not here involved.

Besides the New Hampshire decisions, which deny the whole doctrine of the other authorities, plaintiff relies on the cases of *Forbell v. City of New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 696; *Smith v. City of Brooklyn*, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664, 18 App. Div. 340, 46 N. Y. Supp. 141, and *Farmer v. Stillwater Co.*, 86 Minn. 59, 90 N. W. 10. The courts in New York, by previous decisions, had unequivocally accepted the doctrine of *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Ex. 239, in this language: "An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same as land and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is a part of and not different from the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface":

Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72. In the two cases relied on, the courts expressly adhered to this doctrine, but considered that certain facts in the cases before them took them out of its operation. One of the facts was, the cities had ¹⁵¹ drained an immense area to supply their inhabitants with water and were "making merchandise" of it, a fact which gave rise to the doubt expressed in *Chasemore v. Richards*, 7 H. L. Cas. 349, 29 L. J. Ex. 81, 5 Jur., N. S., 873, 7 Week. Rep. 685. Another was, that an artificial force was applied to draw the water from the adjoining lands, which was held to constitute a trespass; and still another, that the water of defined streams was affected by the exhaustion by the cities of their sources. The existence of these facts was expressly made the ground of the holding that the general doctrine as to taking out of one's own soil water that comes there by percolation did not apply. In the Minnesota case, the defendant made no use whatever of the water, but, for no useful purpose, drained it away and discharged it through the sewers of a town, thus taking it from plaintiff, who was supplying it to the inhabitants of the town for drinking purposes. The court recognized the soundness of the doctrine which we have stated, but held that as the defendant was making no legitimate use of the water he was properly enjoined from thus wasting it. Whether or not the courts in these cases succeeded in establishing just distinctions between them and others applying the general rule we are not called on to determine.

It is readily seen that none of them, in their facts or the principles enforced, sustain this action. The defendant here is making a reasonable and legitimate use of the water which it takes from its own land, which use is not in quality different from or in its consequence to plaintiff more injurious than many upheld in the decisions. There is no claim of malice or wanton conduct of any character, and the effect to be given to such a fact when it exists is beside the present inquiry. No reason exists why the general doctrine should not govern the case.

The judgment of the court of civil appeals is therefore reversed and that of the district court affirmed.

Rights in Percolating Waters are discussed in the monographic note to *Katz v. Walkinshaw*, 99 Am. St. Rep. 66-73, and in the subsequent case of *Barclay v. Abraham*, 100 Am. St. Rep. 365.

DENISON AND SHERMAN RAILWAY COMPANY v. CARTER.

[98 Tex. 196, 82 S. W. 782.]

STREET RAILROADS—Minors—Negligence—Proximate Cause.—The act of a motorman in permitting a minor to ride on the front platform of a street-car, conceding that to be a dangerous place, is not the proximate cause of an injury received in jumping from the car while in motion at the command of the motorman. The act of jumping from the car is the proximate cause of the injury. (p. 630.)

STREET RAILWAYS—Minors.—Doctrine of Turntable Cases as to liability for permitting children to be about dangerous machinery is inapplicable to the mere act of allowing children to get upon any part of street-cars fitted up and used for the conveyance of all ages and classes of persons. (p. 631.)

STREET RAILWAYS—Minors—Evidence of Contributory Negligence.—If a boy, ten years of age, is injured in jumping from a street-car while it is in motion, a city ordinance making it a misdemeanor to jump from moving cars is admissible in evidence as bearing upon the question of contributory negligence. (p. 631.)

NEGLIGENCE—Contributory—Violation of Ordinance.—A person complaining of an injury caused or contributed to proximately by his own violation of a valid city ordinance cannot recover. (p. 632.)

STREET RAILWAYS—Minors.—Negligence of a motorman on a street-car in requiring a boy ten years of age to leave the car while in motion renders the railway company liable for resulting injury, though permission to the boy to enter the car is granted by such motorman to subserve his own purpose, and not in transacting the business of the company. (p. 632.)

Head, Dillard & Head, for the plaintiff in error.

Wolfe, Hare & Semple, for the defendant in error.

²⁰¹ WILLIAMS, A. J. This writ of error is prosecuted by the railway company from a judgment of the court of civil appeals for the fifth district affirming a judgment of the district court against plaintiff in error in favor of Carter, suing by next friend, for damages for personal injuries caused by his being run over by one of the plaintiff in error's electric street-cars in the city of Denison. At the time of the occurrence Carter was ten years old, and the version of it given

by him and his companions is that when the car, which was under the exclusive control of one Pratt, the motorman, reached one of the termini, where they were assembled, one of them asked Pratt if he would allow him to ride if they would turn the trolley for him, and receiving his consent, one of them turned the trolley and all of them entered the car, plaintiff and his elder brother getting upon the front platform with the motorman, and their companions upon the rear platform; that after they had ridden two or three blocks the motorman, without stopping the car, but continually increasing its speed, said to them that they had ridden far enough and directed them to get off; that after the boys in the rear had gotten off, plaintiff's brother jumped from the front platform, and plaintiff, in attempting to follow, was thrown under the wheels of the car and injured. The motorman gave a different account of the transaction. He denied giving permission for the boys to ride, stating that they turned the trolley without his consent and entered the car of their own accord, he supposing they intended to pay fare and ride into town; that as soon as he had given some information to and collected fare from another passenger, he turned his attention to the boys on the front end of the car and said to them, "If you are going to ride get inside; if not, you must get off"; that, seeing they paid no attention to what he said, he knew they did not intend to pay fare, and began to stop the car, noticing which, and before he could stop the car, plaintiff's brother jumped off and plaintiff followed and was hurt, the car at the time moving slowly and slowing up.

The petition asserted negligence on the part of the defendant (1) in permitting him to get upon the car, and (2) in requiring him to leave it while in motion, alleging that on account of his youth and lack of experience and discretion he was incapable of understanding the dangers he incurred in riding on the car and in attempting to alight from it under the circumstances shown. The charge submitted both of these ²⁰² contentions, instructing as to the first as follows: "If you believe from the evidence that said Henry Pratt permitted plaintiff to get on and ride on the front platform of said car, and if you further believe from the evidence that plaintiff was a youth of such immature judgment and discretion that he did not understand the danger, if any, to which he would be exposed in alighting from the front platform of said car while the same was in motion, under the circumstances which you

find from the evidence existed at the time he did alight from said car, and if you further believe from the evidence that the front platform of said car was a dangerous place for plaintiff to ride by reason of his immature judgment and discretion and consequent lack of understanding the danger, if any, attendant upon his alighting from said car while the same was in motion, under the circumstances then existing (if you find that he was at that time of such immature judgment and discretion); and if you further believe from the evidence that said Henry Pratt was guilty of negligence as this term will be defined to you, in permitting plaintiff to ride on the front platform of said car (if you find that said Pratt did so permit plaintiff to ride thereon), and that said negligence, if any, of said Pratt was the direct and proximate cause of plaintiff's injuries, then you will find for the plaintiff, unless you find for the defendant under the other instructions given you." Two objections to this instruction were urged in the court of civil appeals, and to them we confine our attention, viz.: 1. "Negligence of the motorman or driver of the street-car in permitting a child to ride upon such car when such permission is granted to subserve the purpose of the driver individually and not in transacting the business of the owner of the car, does not render such owner liable for the injuries to the child in getting on or off the car." 2. "The evidence in this case did not raise the issue as to plaintiff having been injured by reason of his being permitted to ride at a dangerous place on the car, but only raised the issue as to his having been injured by his being caused by the motorman to leave the car while it was in motion."

1. It may be conceded that the agreement the motorman is alleged to have made was beyond the scope of his authority and did not create any obligation on the part of the company to carry the boys, but it is still true that he was acting within such authority in managing and moving the car, and that for any negligence on his part in doing that his master would be responsible. With his exclusive control of the car he necessarily had power to admit to or exclude from it persons desiring to ride on it, and to those actually on the car by his permission, whether given for one reason or another, the master, in operating it through him, might owe duties for the disregard of which it would be liable. His agreement, considered by itself, may have been his act alone, but his management of the car was, in law, his master's management,

because that was the business intrusted to him. Many authorities sustain the proposition that servants controlling such cars, when receiving and carrying young children, whether with or without consideration, ²⁰⁸ act within the scope of their employment and incur the obligation of performing certain duties for the protection of the children which is ascribed to the master: *Cook v. Houston Direct Nav. Co.*, 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475; *Brennan v. Fairhaven etc. Ry. Co.*, 45 Conn. 284, 29 Am. Rep. 679; *Wilton v. Middlesex Ry. Co.*, 107 Mass. 108, 9 Am. Rep. 11; *Pittsburg etc. Ry. Co. v. Caldwell*, 74 Pa. St. 421; *East Saginaw City Ry. Co. v. Bohn*, 27 Mich. 503; *Richmond Traction Co. v. Wilkinson*, 101 Va. 394, 43 S. E. 622; *Metropolitan Ry. Co. v. Moore*, 83 Ga. 453, 10 S. E. 730; *Chicago etc. Ry. Co. v. West*, 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788; *Sanford v. Hestonville Ry. Co.*, 136 Pa. St. 84, 20 Atl. 799. The liability of the master in such cases does not arise from the mere fact of ownership of the instrument or appliance with which the injury is inflicted, but from the servant's negligence in doing the masters business with such instrument or appliance, which distinguishes those decisions of this court so much relied on by counsel for plaintiff in error as conflicting with the decision in this case: *Branch v. International etc. Ry. Co.*, 92 Tex. 288, 71 Am. St. Rep. 844, 47 S. W. 974; *Dawkins v. Gulf etc. Ry. Co.*, 77 Tex. 232, 13 S. W. 984; *International etc. Ry. Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517. In these cases the servants, in inflicting the injury, were doing nothing in furtherance of the master's business, but were employing the master's property for purposes wholly their own. The case of *Texas etc. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118, involves a different principle. A brakeman committed an assault in ejecting the plaintiff from a freight train, and as it was not shown that it was within the line of his duties to expel trespassers, the court held as it did in *International etc. Ry. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039, that the company was not responsible, unless between it and the plaintiff there existed the relation of carrier and passenger imposing on it the duty of protection; and it was further held that such relation did not exist because the company did not undertake or authorize its servants to carry passengers upon its freight trains. Here, the purpose for which this car was intrusted by the company to the motorman was the carrying of people, and the performance

of his duties, as we have said, involved the admission and exclusion of persons from the car. Hence in receiving and carrying these children upon such a car, if he did so, he was not going beyond the scope of his master's business, as were the servants in the Black case in receiving the plaintiff upon a freight train; nor was he, as were the servants in the other cases relied on, using the property of the master for his own purposes. The fallacy of this contention lies in the assumption that because the servant permitted the boys to ride for an improper reason, in running the car he was not acting for the master. If in the control and management of the car he was guilty of negligence which caused the injury to the plaintiff, the company is responsible.

2. The objection made to the charge in the second proposition must be sustained for the reason that the act of the motorman in permitting plaintiff to ride on the front platform of the car cannot, in this case, be regarded as a proximate cause of the injury. The authorities first cited warrant the proposition that there might be actionable negligence²⁰⁴ in permitting an immature child, incapable of caring for its own safety, to ride in such a position, when it has received an injury proximately resulting from that fact, as when it has fallen from the platform, or has been led by its childish impulses to jump therefrom. It is held that it may be negligence in those managing a car to allow such a child to incur the risks incident to riding in so exposed a position, and also in not exercising a careful watch and restraint over it while so riding. We make no question as to the soundness of these doctrines when applied to some states of fact, but we do not see their application here. No injury resulted to the plaintiff from riding on the platform. He was hurt in jumping off, and under the facts peculiar to this case its decision turns upon the question as to the negligence vel non of the motorman in causing or permitting him to do that. He did not fall from the platform nor jump off because the motorman lost sight of him, but claims that he was caused to jump by the motorman. His own act in jumping was the proximate cause of his injury, and the question is solely as to the legal responsibility for that act, whether it is his or should be imputed to the company because of negligence on the part of the motorman in causing or permitting it; and that is the question that should be submitted with proper instructions to enable the jury to determine it.

It is to be observed that the petition claims that there was negligence in admitting the plaintiff to the car at all, and not that he was permitted to ride upon the front platform as an especially dangerous place. This complaint seems to be based upon the doctrine of the "turntable cases" and others in which liability was fixed upon the owners of dangerous machinery because of enticements or invitations held out to children to expose themselves to the dangers incurred in being in or about such places. It seems to us that doctrine is inapplicable to the mere act of allowing children to get upon cars fitted up and used for the conveyance of all classes of persons, old and young, experienced and inexperienced; and that actionable negligence must consist in something more, such as want of proper care in guarding the safety of those entering such vehicles, in getting on or off, or in traveling on them: *Railway v. Bohn*, 27 Mich. 503; *Barney v. Railway*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847. Of other rulings of the court in giving and refusing instructions plaintiff in error has no just cause to complain.

The plaintiff in error complains of the exclusion of the following ordinance in force in the city of Denison: "Any person, not being a regular employé or officer of the railway company who shall, within this city, jump on or off, cling to or hang on any street railway car while the same is in motion, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two dollars nor more than one hundred dollars." We think the ordinance should have been admitted. The objection that there was no evidence or offer of evidence that plaintiff "had discretion sufficient to understand the nature and illegality of the act constituting the offense" (Pen. Code, ²⁰⁵ art. 35), was not urged in the trial court, the objections made and sustained being of such a nature that an offer of further evidence on the subject would have been futile. Besides, the plaintiff testified before the jury concerning the transaction on which he based his right to recover, and whether or not he had the requisite degree of intelligence was a question for the jury and not for the court. The ruling of the court was that the ordinance was inapplicable to the facts of this case. But the facts were in dispute, and the jury might have found that plaintiff got on and off the car without the consent of the motorman and as a trespasser. If this were true the ordinance might not be necessary to the protection of the defend-

ant, but it was still, we think, entitled to have it admitted in evidence, and its effect explained to the jury. We are further of the opinion that a plaintiff complaining of an injury caused or contributed to by his violation of a valid ordinance of this character should not be allowed to recover. The trial court doubtless based its ruling upon the decision of this court in the case of *Mills v. Missouri etc. Ry. Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497, but that decision would be applicable only in case the jury should find that plaintiff got on and off the car with permission of the motorman and in the exercise of a right. In that case there was not, as there is in this, evidence tending to show that the conduct of the plaintiff was a trespass pure and simple. That a valid ordinance may impose a duty, the violation of which proximately contributing to an injury to another constitutes negligence has often been declared by the courts of this and other states (see cases cited in 21 Am. & Eng. Ency. of Law, 478, 479); and it necessarily follows that such a violation may also preclude a plaintiff from recovering where it has contributed proximately to the injury of which he complains: *International etc. Ry. Co. v. Cocke*, 64 Tex. 151. It is not the mere fact that, when injured, he was violating law, but the fact that his violation led to his injury that defeats him. Under the charges given the jury must have determined, without considering the ordinance, that plaintiff was too young and immature to understand and protect himself against the danger of jumping from the moving car, but they might have found differently as to his ability to comprehend the illegality of an act coming within the terms of the ordinance had it been admitted and evidence heard upon the subject. At any rate it should have been admitted, and the jury should have been instructed as to its bearing upon the case.

Reversed and remanded.

As to the Liability of a Railway Company where its employé induce or compel a trespasser to jump from a moving train, see *Dixon v. Northern Pac. Ry. Co.*, 37 Wash. 310, 107 Am. St. Rep. 712; *Pollock v. Pennsylvania R. R. Co.*, 210 Pa. St. 631, 105 Am. St. Rep. 843; *Bjornquist v. Boston etc. R. R. Co.*, 185 Mass. 130, 102 Am. St. Rep. 332; *Polatty v. Charleston etc. Ry. Co.*, 67 S. C. 391, 100 Am. St. Rep. 750, and cases cited in the cross-reference note thereto; and as to its liability where a passenger is injured in alighting from a moving train at the direction of an employé, see *Southern Ry. Co. v. Bandy*, 120 Ga. 463, 102 Am. St. Rep. 112, and cases cited in the cross-reference note thereto; *Fletcher v. Boston etc. R. R. Co.*, 187 Mass. 463, 105 Am. St. Rep. 414.

TEXAS AND PACIFIC RAILWAY COMPANY v. MUGG.

[98 Tex. 352, 83 S. W. 800.]

RAILROADS—Freight Rates—Misrepresentation of Agent.—If the agent of a railroad company misrepresents its freight rates, whereby a person is induced to make a contract for the sale of goods at a certain price and is compelled to pay a higher freight rate than that represented, thus sustaining a loss, the railroad company is liable in damages for such loss. (p. 635.)

T. J. Freeman, Stanley, Spoons & Thompson and M. Spoons, for the appellant.

W. B. Paddock and R. Harrison, for the appellees.

³⁵³ BROWN, A. J. Certified questions from the court of civil appeals of the second supreme judicial district, as follows:

“We deem it advisable to certify to your honors for decision the question whether or not the appellant, Texas and Pacific Railway Company, is liable to the appellees, Mugg & Dryden, upon the following state of facts, said cause being now before us for determination upon appeal from the county court of Tarrant county, Texas. The cause originated in the justice court, from which it was appealed to the county court of Tarrant county, where a trial was had on the following statement of appellees’ cause of action, to wit:

“Statement of plaintiff’s cause of action. Damages in the sum of \$140.18 as follows: By reason of defendant making and quoting to plaintiffs a rate of \$1.25 per ton on two cars of coal and \$1.50 per ton on one car of coal, in January and February, 1903, respectively, from Coal Hill, Arkansas, to Weatherford, Texas, on which rates so made and quoted plaintiff relied ³⁵⁴ in contracting said coal shipped and sold at prices based on said rates; whereas defendant assessed and collected of plaintiff freight at the rate of \$2.75 per ton on said two cars and \$2.85 on said one car, which said freight rate plaintiff was forced to pay, and did pay under protest, in order to obtain said coal and deliver same in compliance with sales previously made. That plaintiff’s loss and damage in the sum aforesaid were occasioned by defendant’s negligence in making and quoting to plaintiff the said rates, on which rate quoted defendant knew plaintiffs relied and based their sales of said three cars of coal shipped and sold there-

after, and then forcing plaintiffs to pay a greater rate, amounting in the aggregate to the sum of \$140.18, on said three cars of coal, thereby causing plaintiffs' loss and damage in the said sum.'

"To this pleading the appellant answered by general demurrer and general denial, and especially denied that it ever entered into any contract for the shipment of coal for appellees from Coal Hill, Arkansas, to Weatherford, Texas, at the rate alleged in appellees' statement; and further that if it ever quoted any such rate to appellees such quotation was a violation of the interstate commerce act, and was a lower rate than the interstate rate in effect at the time the shipment was made which had been duly published, printed and posted in its depot and stations as required by the terms of the act; and further that it collected from appellees the exact rate prescribed for such commodity under said act, and that such contract, if any was made, was in violation of law and void. Upon a trial without a jury judgment was rendered for the appellees for the amount sued for and all costs of suit.

"It is agreed by the parties that the rate charged and collected on the shipments of coal in controversy from Coal Hill, Arkansas, to Weatherford, Texas, as shown in appellees' statement of cause of action, was the regular rate in effect at the time the shipments were made, as shown by the printed and published schedules of the Texas and Pacific Railway Company on file with the interstate commerce commission, and posted in the stations of said railway company, as required by the interstate commerce act. There is no assignment challenging the sufficiency of the evidence to support the material allegations of appellees' pleadings."

We answer that the railroad company is liable to the appellee for damages occasioned by the misrepresentation of the rate of freight as shown by the statement of facts.

The authority of the agent, who stated the rate to the appellee, is not questioned. The fact that the agent named a rate less than that which was in effect at the time and which was posted according to the interstate commerce law will not avoid the claim of the appellees for damages arising out of the misrepresentation of the appellant's station agent. It is true that if the agent had made a contract with the appellees for the shipment of the coal from Coal Hill, Arkansas, to Weatherford, Texas, at the rate stated by him, that contract could not have been enforced, because it would have been in

violation of the interstate commerce ³⁵⁵ law. But this suit was not brought upon such contract for its enforcement: there was no contract; it is an action for damages occasioned to the appellees by the misrepresentation of the agent of the railroad company, whereby the appellees were caused to make a contract for the sale of coal at a certain price, relying upon the representation by appellant's agent that the freight rate would be as stated, whereas the appellees were compelled to pay a higher rate, and thus the damages arising to the appellees were occasioned by the misstatement which induced them to make the investment in the coal and the contract for its sale: *Pond-Decker Lumber Co. v. Spencer*, 30 C. C. A. 430, 86 Fed. 846; *Missouri Pac. Ry. Co. v. Crowell Lumber Co.*, 57 Neb. 293, 70 N. W. 964.

The two cases cited are very similar in their facts to this. In *Pond-Decker Lumber Co. v. Spencer*, the identical question here presented was raised and decided in accordance with our opinion, although there are some facts in the case which would distinguish it from this upon other points, and the case might have been decided possibly without deciding the question involved here, yet the question was involved in that case and was decided by the court; it is therefore authority for the answer that we have made. The second case cited above determines the question of the right of a shipper to recover damages accruing by reason of the misrepresentation of a freight rate and was based upon facts very similar to those certified in this case.

For Authorities bearing upon the decision in the principal case, see *Rowland v. New York etc. R. R. Co.*, 61 Conn. 103, 29 Am. St. Rep. 175; *Illinois Cent. R. R. Co. v. Seitz*, 214 Ill. 350, 105 Am. St. Rep. 108; *Hays v. Western Union Tel. Co.*, 70 S. C. 16, 106 Am. St. Rep. 731.

BARNETT v. MATAGORDA RICE AND IRRIGATION COMPANY.

[98 Tex. 355, 83 S. W. 801.]

WATERS—Surface—Control of.—The owner of land may withhold the water falling upon his land from passing onto that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming onto his own land. (p. 639.)

WATERS—Surface.—Right to Discharge water falling on one's own land onto the land of another or to receive the water falling on the latter's land can have no legal existence except from a grant express or implied. (p. 639.)

WATERS—Surface—Obstructing Flow of.—The owner of land may erect along his boundary lines and upon his own premises, an irrigation ditch with an embankment which prevents the escape of the surface water from the land of an adjoining owner without liability to the latter for so doing. (p. 640.)

W. H. Holman, for the appellant.

E. F. Higgins, for the appellee.

357 **WILLIAMS, A. J.** This case is before us upon the following certificate from the court of civil appeals for the first district:

“The questions hereinafter stated arise upon the following facts disclosed by the record in this cause now pending before us on appeal.

“J. A. Barnett was the owner of a thirty-five acre tract of land which he occupied with his family as a home.

“D. P. Moore owned a large tract south of and adjoining Barnett's land. Ira G. Bond controlled the land adjoining Barnett's on the east.

“The Matagorda Rice and Irrigation Company is a corporation chartered under the laws of Texas for the purpose of taking water from the Colorado river for irrigation, and to this end has established a pumping plant, canals and laterals for its proper distribution.

“With Moore's consent one of the company's laterals was constructed on Moore's land about twenty feet south of Barnett's south line. In the construction of this lateral it was necessary to throw up an earthen dyke on the side next to Barnett's property, the earth used for the purpose being taken from Moore's land on the north side of the lateral, thus leaving a ditch called a 'borrow-pit.' This lateral was in-

tended and used in the irrigation of Moore's land, and the dyke was necessary to keep the irrigation water on his land. Later Bond concluded to irrigate his land, and with the consent of Moore and the co-operation of the company, connected his irrigation ditch with the lateral on Moore's land in order that the company might furnish him the necessary water by means of that lateral. In constructing his own ditch Bond threw up an earthen dyke near Barnett's east line, and in connecting his ditch and dyke with the Moore lateral he filled the above-mentioned borrow-pit, thus preventing the surface water which fell on Barnett's land from running off over Moore's into an adjacent running stream wherein ³⁵⁸ it had drained by reason of the natural lay of the land until the construction of the Moore and Bond dykes.

"Barnett's property was situated in the right angle formed by the junction of these dykes, and his land being higher near his north line and sloping toward the junction of the dykes, the surface water in time of rain filled the borrow-pits, flowed back and stood on plaintiff's land, injuring his crops, causing him inconvenience, and affecting his wife's health. For his damages in these respects and for damages caused by an alleged overflow of water from the Moore irrigation ditch he seeks a recovery in this suit.

"In view of the doctrines announced in *Gross v. City of Lampasas*, 74 Tex. 195, 11 S. W. 1086, and *Gembler v. Echterhoff* (Tex. Civ. App.), 57 S. W. 313, we deem it wise to propound for your decision the following questions:

"1. Are Moore and Bond, or either of them, liable for injury resulting to Barnett from the surface water, the natural flow of which was inevitably obstructed and caused to stand on Barnett's land by the dykes or embankments necessary to hold the irrigation water on the Moore and Bond lands?

"2. Was the irrigation company liable for damages due to the collection of surface water necessarily resulting from the proper construction of their laterals on the Moore land?"

Taking up the second question first, it may be safely assumed that the irrigation company is not liable if Moore and Bond are not. No facts are stated to make it liable under section 17 of article 1 of the constitution for damaging plaintiff's property for public use. What it did was done upon Moore's land by his authority, and it is not liable for the damage claimed unless Moore would be had he done the same thing.

In the case of *Gross v. City of Lampasas*, 74 Tex. 195, 11 S. W. 1086, the plaintiff erected a wall along the line of his lot so as to intercept the surface water, which had previously flowed through a depression across a street of the city and found its outlet over the lot. The effect was to throw the water back upon the street and other private property and to form an almost permanent pond. It was held that the plaintiff had the right to do this, the court saying: "We think that under the facts of this case plaintiff enjoyed the right to build the wall upon his own land and prevent its overflow by the surface water: *Lessard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715. Having this right, plaintiff stood with regard to the nuisance created by the surface water after it had been obstructed by the wall as did other people affected by it, and just as he would have stood if not previously connected with it in any way."

In the use and control of its streets, a municipal corporation, in the absence of qualifying statutory provisions, has the same rights with respect to the disposition of surface water as have owners of land generally, it and owners of lots adjacent to streets occupying toward each other the same relations as those of other adjoining land owners: *Gould on Waters*, sec. 269. The decision in the *Gross* case is therefore ⁸⁵⁹ a clear recognition of the rule of the common law as to the right of land owners to repel the flow of surface water over their lands from those adjoining, and that whatever damage is caused by the exercise of this right is to be regarded as *damnum absque injuria*. The doctrine of the common law upon the subject is thus stated in *Bowlsby v. Speer*, 31 N. J. L. 351, 86 Am. Dec. 216, which is quoted with approval by Judge Brewer, then of the supreme court of Kansas, in *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 243: "It is not one of the legal rights appertaining to land that the water falling upon it from the clouds shall be discharged over land contiguous to it; and this is the law, no matter what the conformation of the face of the country may be, and altogether without reference to the fact that in the natural condition of things the surface water would escape in any given direction; the consequence is therefore that there is no such thing known to the law as a right to any particular flow of surface water, *jure naturae*. The owner of land may at his pleasure withhold the water falling on his property from passing onto that of his neighbors, and in the same manner may prevent

the water falling on the land of the latter from coming upon his own. In a word, neither the right to discharge nor to receive surface water can have any legal existence except from a grant, express or implied. The wisdom of this doctrine will be apparent to all minds on a little reflection. If the right to run in its natural channels was annexed to surface water as a legal incident, the difficulties would be infinite indeed. Unless the land should be left idle, it would be impossible to enforce the right in its rigor; for it is obvious every house that is built and every furrow that is made in a field is a disturbance of such right. If such a doctrine prevailed, every acclivity would be and remain a watershed, and most low ground become reservoirs. It is certain that any other doctrine but that which the law had adopted would be altogether impracticable. The legal principle, as stated above, is fully established in the following cases: *Greatrex v. Hayward*, 8 Exch. 291, 22 L. J. Ex. 137; *Rawstron v. Taylor*, 11 Exch. 369, 25 L. J. Ex. 133; *Broadbent v. Ramsbotham*, 11 Exch. 602, 25 L. J. Ex. 115, 4 Week. Rep. 290; *Dickinson v. City of Worcester*, 7 Allen, 19; *Parks v. City of Newburyport*, 10 Gray, 28; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Ashley v. Wolcott*, 11 Cush. 192; *Shields v. Arndt*, 3 Green, 234." A great number of other decisions to the same effect might be cited.

In *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625, a brief statement of the rule is thus given by Chief Justice Bigelow: "The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." We quote this passage because it gives a qualification of the right defined which must always be kept in mind, that the action of the land owner must not exceed a "due exercise of dominion over his own soil." The case involved a question which does not arise here, as to the right of one proprietor, for the protection of his own ³⁶⁰ soil, to turn upon his neighbor's land water which otherwise would not have flowed upon it, and upon that question we express no opinion.

The qualification referred to explains the distinction between the decisions in the two cases referred to in the certificate. The *Gross* case showed only the proper exercise of dominion by the owner over his own property, while the other

case showed the collection and storage of water in a permanent pond by one owner in such way as to constitute an invasion of the possession of an adjoining proprietor and the use of his land in maintaining the pond of water as property of the person storing it. The distinction is clearly stated in the opinions of Justices Fly and Neill: *Gembler v. Schterhoff* (Tex. Civ. App.), 57 S. W. 314, 315.

The present case shows only that the owners of soil did upon it that which their ownership entitled them to do, putting it to a natural and legitimate use in improving it for agricultural purposes. This was no wrong to plaintiff unless he had the legal right to have the surface water naturally flowing upon his land to pass over that of the defendants, which, as we have seen, is not true under the principles of the common law. We therefore answer that the facts stated show no liability on the part of the defendants.

The Doctrine of the Principal Case will be found discussed in the monographic note to *Mizell v. McGowan*, 85 Am. St. Rep. 726-735. See, too, the recent case of *Baltimore etc. R. R. Co. v. Quillen*, 34 Ind. App. 330, 107 Am. St. Rep. 158, and cases cited in the cross-reference note thereto.

BORDEN v. TRESPALACIOS RICE AND IRRIGATION COMPANY.

[98 Tex. 494, 86 S. W. 11.]

CORPORATIONS—Irrigation—Eminent Domain.—A corporation organized for the construction of canals and for the declared purpose of irrigation, milling, navigation and stockraising, under authority of a statute allowing corporations to be formed for such purposes, has authority to condemn private property for the construction of a canal for irrigation purposes. (p. 644.)

CONSTITUTIONAL LAW—Title of Statute—More Than One Purpose.—A statute, the caption and body of which provide only for the general subject of a water supply for various industries, does not embrace more than one subject within the meaning of constitutional provisions. (p. 646.)

CONSTITUTIONAL LAW—Subject of Statute—Eminent Domain.—A statute providing generally a method for the acquisition and a means for the conveyance of water authorized for use in various industries named therein, necessarily includes the exercise of the right of eminent domain, in the acquisition of rights of way for canals and ditches, although the exercise of such right is not mentioned in the caption, nor in the body of the statute. (p. 647.)

CONSTITUTIONAL LAW—Vagueness of Statute.—A statute authorizing the appropriation of water for irrigation and other purposes, declaring it to be public property for such purposes, and designating the territory in which it is to operate as “those portions of the state in which by reason of the insufficient rainfall, or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes,” is not void for vagueness in designating the localities in which it shall operate. Such statute operates throughout the state where the conditions named exist. (p. 647.)

CONSTITUTIONAL LAW—Public Use.—Whether a given taking of private property is a taking for public use can always be investigated in the courts, no matter what may have been the action of the legislature concerning it. (p. 648.)

CONSTITUTIONAL LAW—Public Use.—Private property is taken for a public use only when there results to the public some definite right or use in the business or undertaking to which the property taken is devoted, and such public right or use must result from the law itself and not be dependent entirely upon the will of the donee of the power. (p. 648.)

CONSTITUTIONAL LAW—Public Use—How Determined.—If it can be gathered from all the provisions of a statute that the recipient of the power to take private property is charged with duties to the public, or that a right of use in that for which the property is taken is secured to the public, the manner in which, or the form of expression by which, it is done, is immaterial, as the courts cannot inquire into the wisdom or expediency of the regulations adopted by the legislature for the protection of the public, further than to see that a public use is secured. (p. 649.)

CONSTITUTIONAL LAW—Public Use—How Determined.—The question whether a public use springs from a law granting the right of eminent domain to a corporation is largely influenced by the character of the franchise granted to it and the business it is authorized to carry on. (p. 650.)

W. C. Carpenter, H. B. Williams and W. J. J. Smith, for the plaintiffs in error.

Coke & Coke, for the defendant in error.

504 WILLIAMS, A. J. This case involves a contention between the parties as to the validity of certain condemnation proceedings under which defendant in error claims a right of way for its works over the land of Borden and others, who were plaintiffs in the district court. The judgments of that court and of the court of civil appeals were in favor of defendant and the cause is before this court on writ of error.

Defendant is a corporation chartered and organized under subdivision 23 of article 642 and article 704 of the Revised Statutes, and also under an act of 1895 (Laws 24th Leg., pp. 21-26, 27, 28), the provisions of which now constitute

articles 3115-3131 of the Revised Statutes. The purpose declared in its charter is the construction, maintenance and operation of dams, reservoirs, lakes, wells, canals, flumes, laterals and other necessary appurtenances for the purposes of irrigation and milling, navigation and stock-raising in the county of Matagorda.

After its organization it filed, on March 5, 1902, with the county clerk of Matagorda county, in accordance with section 6 of the act of 1895, its sworn statement showing its intention to appropriate, for irrigation purposes, the unappropriated waters of the ordinary flow or underflow of the Colorado river and of constructing canals, laterals, etc., through which to convey said water for the irrigation of agricultural land situated in said county, and showing, besides the other things required, that it proposed to irrigate approximately seventy-five thousand acres of land. This was accompanied by the map required by the statute showing the route of the canal, from which it appeared that it would pass through or touch numerous different tracts of land.

The lands of plaintiffs lay between the headgate of the canal on the ⁵⁰⁵ river and its other terminus, and defendant instituted and conducted to a successful termination condemnation proceedings to acquire the right of way over such lands for its canal. No question is made as to the regularity and sufficiency of such proceedings to invest defendant with the right it claims, if there was lawful authority for the condemnation. It is proper to state that the condemnation was sought and allowed only for the purpose of collecting and conveying water for irrigating agricultural lands.

In the trial of this cause in the district court, it was made to appear that defendant's plant is capable of irrigating sixty thousand acres of land in tracts belonging to twenty-six different owners. This land is rich and is capable of being made, by irrigation, to produce in good quantities corn, rice and most garden vegetables. Because of the irregularity and insufficiency of the rainfall, the only crop that has been grown was cotton, and that was never raised to any large extent, the principal industry of the section having been cattle raising. The value of the lands irrigated is very greatly increased thereby.

The attack made upon the condemnation proceedings is based upon the alleged absence of any sufficient authority in the statutes under which they were prosecuted. Prior to the passage of the act of 1895, articles 642 and 704 of the Revised Statutes were in force. Subdivision 23 of the first-named article authorized the formation of corporations for "the construction, maintenance and operation of dams, reservoirs, lakes, wells, canals, flumes, laterals and other necessary appurtenances for the purposes of irrigation, navigation, milling, mining, stock-raising and city waterworks. Article 704 provided that: "Every canal corporation for the purpose of irrigation shall, in addition to the powers heretofore conferred, have power: 4. To furnish water for irrigation at such rates as such organization may, by its by-laws and regulations, pdescribe. . . . 6. To enter upon and condemn and appropriate any lands of any person or corporation that may be necessary for the uses and purposes of said company, the damages for any property thus appropriated to be assessed and paid for in the same manner as is provided by law in the case of railroads."

The act of 1895 provides in its eleventh section that "corporations may be formed and chartered under the provisions of this act and of the general corporation laws, for the purpose of constructing, maintaining and operating canals, ditches, flumes, feeders, laterals, reservoirs, dams, lakes and wells, and of conducting and transferring water to all persons entitled to the same for irrigation, mining, milling, to cities and towns for waterworks, and for stock-raising and for the purpose of building storage reservoirs for the collection and storage of water for the uses before mentioned." Section 12 of that act provides that "All corporations and associations formed for the purpose of irrigation, mining, milling, the construction of waterworks for cities and towns, and stock-raising, as provided in this act," shall have right of ⁵⁰⁸ way over public lands, and that such corporation or association of persons as well as cities and towns may obtain the right of way over private property and water belonging to riparian owners by condemnation as provided in the case of railroads.

1. The first contention of plaintiffs is that the defendant is not invested with the power of eminent domain either by this act or the previously existing law, because it is

not the identical corporation to which the power is granted by those laws. The lack of identity is said to consist in the facts that only canal corporations for the purpose of irrigation alone are the recipients of the power granted by article 704, while defendant is a canal corporation for that and several other purposes; and that only corporations formed for all of the purposes mentioned in the act of 1895, and for none others, are to receive the power granted by that act, while defendant is incorporated for only a part of the purposes so mentioned and for one purpose (navigation) not mentioned. It will be observed that all of the purposes to which defendant undertakes by its charter to apply the water which it is to control are within one or the other of the laws quoted. Those laws are by the provision of the twelfth section of the act of 1895 connected together and made to constitute the body of the law upon the subject of the utilization of water for the promotion of the several industries of which they treat. Those industries, as specified in article 642 and in the act of 1895, are the same except that the former includes navigation, which is omitted from the latter. The twelfth section of the latter, however, provides that corporations may be formed under it and the general corporation laws for the purpose of constructing the named works for the specified purposes, and we think there is found in this legislation itself a refutation of this contention.

The first section of the act of 1895 authorizes the appropriation of water, declared to be public property, "for the uses and purposes hereinafter provided." The second section authorizes the storage and diversion of storm or rain waters for irrigation, mining, milling, waterworks, or stock-raising. The latter part of the section connects together conjunctively these various industries to be promoted. The third section, with reference to the waters of streams, authorizes their use for irrigation, mining, milling, waterworks, or stock-raising, and forbids the diversion of such water to the prejudice of riparian owners except "after condemnation thereof in the manner as hereinafter provided." The fourth section directly provides that the appropriation of water must be for irrigation, etc., or stock-raising.

From these features of the statute, as well as from those pointed out in the opinion of the court of civil appeals, it

is evident that the appropriation of water by individuals, associations of persons, or corporations may be for any one of these purposes and need not be for all. This is further borne out by the sixth and eighth sections, which prescribe the statements and declarations which are to be filed by ⁵⁰⁷ "every person, corporation or association of persons." The only statement to be made relating directly to any business to be affected is with reference to irrigation, and the eighth section expressly authorizes the appropriation of water by such statements for irrigation purposes alone. This being the authority for appropriation of water for the various purposes, singly or together, should the mere fact that section 11, in authorizing the formation of corporations for the collection and furnishing of water, mentions conjunctively the purposes for which it may be furnished, be treated as a requirement that the corporation shall by its charter assume the duty of furnishing for all the businesses? We think not. The provisions recited are sufficient to show the incongruity which such a construction of the eleventh section would introduce between it and the others by requiring the corporation, the instrumentality for the appropriation and use of the water, to assume to take it for all of the named purposes, when it is expressly permitted to take it for only one of them. Natural persons, treated throughout the act in the same way as corporations, are not required, in appropriating water, to use it for all purposes, nor forbidden to engage in any other business, and it seems plain that the legislature did not intend to require of corporations an undertaking, without regard to the circumstances and situation of the localities in which they were to appropriate and furnish water, to supply it for all of the businesses for which the statute permits it to be appropriated, when in such localities only some of the businesses may be practicable. With regard to the contention that the introduction of "navigation" into defendant's charter as one of the businesses in which water is to be used, there may be a question whether or not section 4 of the act of 1895 so far modifies article 642 as to forbid such use of water, a decision of which is not necessary. If that use is still authorized, the charter may properly include it. If it is unauthorized, this part of the charter is simply inoperative and does not affect the de-

fendant's other powers. It has not sought to condemn the land in question for any purpose save irrigation, and as its charter is valid and permits it to engage in that business alone, no valid objection arises. When we thus reach the conclusion that defendant is a corporation, formed as provided in the act of 1895, it follows that the twelfth section thereof grants to it the right of condemnation.

2. The whole of the act of 1895 is attacked as being in conflict with section 35 of article 3 of the constitution, in that it expresses, both in its title and body, more than one subject. The title is as follows: "An act to encourage irrigation and to provide for the acquisition of the right to the use of water and for the construction and maintenance of canals, ditches, flumes, dams, reservoirs and wells for irrigation, and for mining, milling, the construction of waterworks for cities and towns and stock-raising."

We agree with the court of civil appeals when it says: "The one general subject of legislation indicated by this caption is to provide a ⁵⁰⁸ method for the acquisition and a means for the conveyance of water for use in the several industries therein named. There is no incongruity in the subjects expressed in the caption or in the body of the act. Neither the caption nor the body of the act deals with the several industries named therein in any respect except as to the method and means of supplying water for their use, which as before stated is the general subject expressed in the caption: *State v. Bowers*, 14 Ind. 195; *Cooley's Constitutional Limitations*, 7th ed., 206." We see nothing even questionable in the fact that a statute, providing for the appropriation and use of water declared to be public property, defines the various uses to which it may be devoted. Taken literally, the twelfth section does seem to treat of the organization of corporations and associations for all of the businesses of irrigation, mining, milling, waterworks and stock-raising, and not merely those formed for supplying water for carrying on those businesses, but a close examination of the language in connection with all of the other provisions makes it plain that this is due merely to lack of fullness of expression. The corporations and associations spoken of are those formed "as provided in this act," and the only corporations that may be formed as so provided are those authorized in the

eleventh section, in connection with the general corporation law, for the purpose of obtaining and conveying water for use in the several businesses named. That is the one purpose pervading the act. The provision in the twelfth section in favor of cities and towns is incidental merely to the use of water for waterworks.

Another position taken is that the provision authorizing the acquisition of the right of way over land is not within the language of the title, but is excluded by that part of it which specifies the acquisition of the right to water. But the title mentions a number of things to be provided for by the bill as incidents of the general purpose, such as canals, ditches, etc., which must occupy land; and hence provision for the acquisition of sites for them follows as a natural, if not a necessary, incident.

3. It is next urged that the act is void because of the indefiniteness of the designation of the territory in which it is to operate, the supposed designation being of "those portions of the state of Texas in which by reason of the insufficient rainfall or by reason of the irregularity of the rainfall irrigation is beneficial for agricultural purposes." We do not understand that it was the purpose of the legislature to designate any part of the state as a territory to which the act is to be restricted in its effect. It is to operate throughout the state wherever the conditions prescribed may exist. We do not know that this, of itself, invades any constitutional right of the citizens. The citizen's property cannot be taken except for public use nor without compensation. The conditions under which this may be done must exist to justify a taking as for a public use, and, where they do exist, we do not see that the additional requirement that irrigation be beneficial to agriculture because ⁵⁰⁹ of the insufficient rainfall prejudices the property owner. The extent to which the public may be interested in or benefited by an irrigation project may depend materially upon the very inquiry indicated by this clause of the statute; for the benefit to the public in the use of the water may, in given situations, be so inconsiderable as that the use for which the water and other property is proposed to be taken should not be regarded as a public use. So long as the citizen's property is not taken for uses not public in their nature, we do not see that he

has any cause to complain of such a provision as that in question; and whether or not a given taking is for a public use can always be investigated in the courts, whatever may have been the action of the legislative department concerning it.

4. This brings us to the question upon which we have had most doubt and difficulty, that is: Is the purpose for which the law authorizes the taking of private property a public one? It is not contended that the acquisition of the right to the use of water by the public, or a portion thereof, for the purposes indicated in the statutes may not be a public use justifying the employment of the power of eminent domain. That it is, is established by many adjudications. The contention is that the laws in question do not secure any such use to the public, or to any part of it, but that they authorize the creation of purely private corporations and associations of persons for the carrying on of businesses wholly private, and attempt to empower them to take private property for use in such businesses, without being required to assume any duty to, or to respect any right in, the public. If this were true, we should feel constrained to sustain the attack upon those provisions granting the right of condemnation, for we are not inclined to accept that liberal definition of the phrase "public use" adopted by some authorities, which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain. With the court of civil appeals and counsel for plaintiffs and those authorities which they follow, we agree that property is taken for public use as intended by the constitution only when there results to the public some definite right or use in the business or undertaking to which the property is devoted. And we further agree that this public right or use should result from the law itself and not be dependent entirely upon the will of the donee of the power: *In re Theresa Drainage Dist.*, 90 Wis. 301, 63 N. W. 288. Such, at least, we shall assume to be the principle governing this case.

We think it obvious, however, that if it can be gathered from all the provisions of a statute that the recipient of the power is charged with duties to the public, or that a right of use in that for which property is taken is secured

to the public, the manner in which, or the form of expression by which, it is done, is immaterial to such an inquiry as this. We think it further true that the courts cannot inquire into the ⁵¹⁰ wisdom or expediency of the regulations adopted by the legislature for the protection of the public, further than to see that a public use is secured. The question whether or not a public use springs from a law granting the right of eminent domain to a corporation is largely influenced by the character of the franchise granted to it and the business it is authorized to carry on. At the present day it would hardly be doubted that the mere acceptance of a franchise to build and operate a railway or a telegraph or telephone line, a turnpike or a ferry, coupled with the power of eminent domain, would involve the assumption of duties to the public. An irrigation company is not so plainly of a quasi public character as those instanced, since it may be engaged in a business either wholly private, or of a partly public character; and hence we must look into the law authorizing such an enterprise to see the nature of the rights and powers which are granted, on the one hand, and of the duties exacted, on the other, to determine its character, when, as here, that is not expressly declared by law. We find in the act of 1895 grants of the right and power to appropriate the public waters of the state and to acquire by condemnation the private property of the citizen in both water and land. These are powers which do not properly belong to those engaged in purely private businesses. We next find that this is done for the purpose of enabling the takers to convey and transfer such water "to all persons entitled to the same" for specified purposes. From this it is evident that the business contemplated is the furnishing of water to others. Who the others "entitled" are and what they are entitled to are questions not expressly answered by the statute, but when it is found that the sites and route of the canal and other works are to be evidenced by a public record, the answer to the first question is easily found, and it embraces, in the language of the eleventh section, "all persons who own or hold a possessory right or title to land adjoining or contiguous to any canal," etc. What are the rights of those persons and the corresponding duties of the owner of the plant are very indefinitely defined, and at this point it is argued that the very regulations made

confer such rights and powers on the corporation as to exclude the idea of any duty and to make the interest of others wholly dependent on its will. Full power and authority are given to make contracts for the sale of permanent water rights, and to lease, rent or otherwise dispose of the water controlled by such corporation for such time as may be agreed upon. The act next provides that "all persons who own or hold a possessory right or title to land adjoining or contiguous to any canal," etc., "and who shall have secured a right to the use of water shall be entitled to be supplied with water in accordance with the terms of his or their contract," and that "in case of shortage of water from drought, etc., the water shall be divided among all consumers pro rata according to the amount he or they may be entitled." The sale of the permanent water right is made to constitute an easement to the land which is to ⁵¹¹ pass with the title to it, so that the owner of it shall be entitled to water upon the terms provided in his contract, "or, in case no contract is entered into, then at just and reasonable rates." Further provision is made in favor of persons otherwise entitled to water but who have been unable to agree upon a contract for a permanent water right, or for the use of rental of water, securing to them the right to water when the owner of the plant has or controls any not contracted to others.

The power to contract, here given, to the owner of the plant cannot, if the business is to be regarded as affected with a public interest, be recognized as absolute and uncontrolled. Common carriers and others engaged in public callings have the power to contract, but it cannot be so employed as to absolve them from their duties to the public or to deprive others of their rights. Rights are evidently secured by this statute to those so situated as to be able to avail themselves of the water provided for, and those rights it is the duty of the owners of the contemplated business to respect; and the power to contract, under the well-recognized principles applicable to those charged with such duties, must be exercised in subordination to such duties and rights. Reasonable contracts are what this statute means and not contracts employed as evasions of duty.

The provisions of article 704 for the making of regulations fixing rates applies to these corporations, subject to the control of the law, which says that such regulations

must be reasonable. It is not entirely clear when all of the provisions of the act of 1895 are considered whether those who do not make contracts are wholly postponed to those who do or not. If they are, with the qualification that the contracts must be made in good faith and be reasonable, we cannot see in this anything to raise a constitutional question. The question as to the expediency of the regulations was for the legislature. Furthermore, when the conclusion is reached that this is a business in which the use of the water is secured to the public in consideration of the franchise and privileges granted, there results a power in the legislature to further regulate it in a reasonable way.

Other indications that the business authorized is a quasi public one are found in the statute. The provisions requiring a record of the plan and map of the canals, etc., prescribing the time within which the work must be commenced and completed, giving the right of way over public lands, roads, and highways, requiring the removal, in certain instances, of public highways and bridges to give place for some of the works, the employment, in condemnation, of the same rules that apply in cases of railroads, all these tend to the same conclusion.

The fact that the same owner is allowed to furnish the water for so many different purposes may complicate the business in some instances, but this does not detract from its character as impressed with a public use. All such considerations were for the legislature.

It is argued, in effect, that the broad terms of the statute would ⁵¹² allow the condemnation of private property to be used in the businesses specified when they are conducted wholly for the benefit of those prosecuting them. The right to condemn private property is only given to corporations or associations formed to carry on the business contemplated by the statute, which we have seen is to be conducted for public benefit. The constitution itself protects private property from any taking except for the public use, and the statute must be viewed as having been adopted in subordination to that provision and not in violation of it, unless the latter construction is required by the provisions of the act. The act itself manifests the purpose which we have shown, and the power it gives cannot be employed to take private property for any purpose ex-

cept the public one intended. Any citizen whose property is sought to be taken in aid of a given enterprise is to have a hearing, in which the question whether or not the use to which the property is to be devoted is a public one may be fully considered, and, if it be found that such is not the character of the use, the statute does not authorize and the constitution forbids the taking.

Plaintiffs' presentation of this case does not embrace any claim that there is anything in the enterprise undertaken by defendant which makes it private or divests it of a public character, if the law under which it proceeded is sufficient to impress such a character upon the corporations authorized by it. We may say, however, that the facts of the case sufficiently show the existence of the conditions prescribed by the statute and a sufficiently extensive public use to sustain the proceedings under which defendant claims, or at least to make the question one of fact upon which this court cannot review the decisions of other tribunals.

The judgments below will therefore be affirmed.

The Condemnation of Property in furtherance of irrigation under the power of eminent domain is discussed in the recent monographic note to *Zircle v. Southern Ry. Co.*, 102 Am. St. Rep. 831. Consult, in this connection, the recent cases of *Berrien Springs Water etc. Co. v. Berrien Circuit Judge*, 133 Mich. 48, 103 Am. St. Rep. 438; *Highland etc. Min. Co. v. Strickley*, 28 Utah, 215, 107 Am. St. Rep. 620.

Whether the Existence of a Public Use under the right of eminent domain is a legislative or a judicial question, is discussed at length in the monographic note to *Chicago etc. Ry. Co. v. Morehouse*, 88 Am. St. Rep. 926-946. See, too, the subsequent cases of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964; *Zircle v. Southern Ry. Co.*, 102 Va. 17, 102 Am. St. Rep. 805.

WATKINS LAND COMPANY v. CLEMENTS.

[98 Tex. 578, 86 S. W. 733.]

JUDGMENTS—Injunction.—A judgment enjoining the use of water to irrigate undefined parts of a number of surveys is too indefinite to be enforced. (p. 656.)

JUDGMENTS—Injunction.—A judgment enjoining persons, not parties to the suit, but interested in the subject matter thereof, is erroneous and cannot be enforced. (p. 656.)

WATERS—Riparian Rights—Irrigation—Prescription.—A right of one riparian proprietor to appropriate the water of a stream for irrigation to the exclusion of the irrigation rights of another riparian owner may be acquired by prescription. (p. 656.)

WATERS—Riparian Rights—Irrigation—Prescription.—A riparian owner cannot acquire exclusive irrigation rights by limitation against his grantor, who expressly reserves in the deed all riparian rights belonging to him and especially provides that the conveyance shall in no wise affect his rights as a riparian owner. (pp. 656, 657.)

WATERS—Riparian Rights and Lands.—Riparian rights arise out of the ownership of lands through or by which a stream of water flows, but such rights cannot extend beyond the original survey as granted by the government. (p. 657.)

WATERS.—Riparian Land is restricted to that the title to which is acquired by one transaction. (p. 657.)

WATERS—Riparian Rights.—A riparian owner cannot ordinarily divert water to land lying beyond the watershed of the stream. (p. 657.)

WATERS—Riparian Rights—Irrigation.—Subject to the right of natural use by other riparian owners, each riparian owner is entitled to use the water of a stream, which flows by or through his land, for the purposes of irrigation; provided such use is reasonable considering all the circumstances and conditions under which it is made. (pp. 657, 658.)

WATERS—Riparian Rights.—Each riparian owner has equal rights in the stream of water which flows by him, and the use by each must be reasonable as regards the rights of others, and courts have ample authority to ascertain the relative rights of riparian owners and to regulate the manner of using the water. (p. 658.)

WATERS—Riparian Rights—Irrigation and Lands.—The rule that the use of water by one riparian owner must be reasonable as against the rights of other riparian owners, applies to lands within arid regions as well as others, and irrigation does not become a natural use of the water because the land is arid. (p. 661.)

WATERS—Riparian Rights—Nonriparian Lands.—A riparian owner has no right to appropriate the water of the stream flowing through or by his land, to the irrigation of nonriparian land, owned by him, although it may join riparian land, nor has he any right to sell the water to others to irrigate lands not riparian. (pp. 662, 663.)

T. J. Hefner, A. C. Mitchell and Edwards & Edwards, for the plaintiffs in error.

J. E. Starley and R. W. Flournoy, for the defendants in error.

⁵⁸² BROWN, A. J. E. Clements instituted this suit in the district court of Reeves county against the Watkins Land Company, C. W. Giffin, Mrs. Videe Coleman, Raymond Rodrigues and his wife, Lemona Rodrigues, Aculane Villereal, Mary Villereal, Delfine Coleman, a minor, and Ysabell Coleman, a minor, represented by their guardian ad litem, G. M. Frazer. Plaintiff alleged, in substance, his ownership of certain lands, which are fully described, and that they were riparian to Toyah creek in Reeves county, which was a well-defined natural stream, and that said lands are situated within the arid portions of the state which require irrigation for the purposes of agriculture. It is alleged that plaintiff had for many years irrigated his lands from said creek; that the defendants had diverted the waters of the said Toyah creek to unlawful uses, whereby the plaintiff had been deprived of a sufficient supply of water, and the petition prayed for an injunction restraining the defendants from unlawfully diverting said water for improper uses. The case was tried before a judge, who filed conclusions of fact from which we make this statement, which is sufficient for present investigation.

Toyah creek is a stream with well-defined channels and banks, its source being what is called "a head spring," which flows twelve heads ⁵⁸³ of water, and Saragosa spring also furnishes two and one-half heads of water which flows into the said creek. A spring which the defendant Giffin uses exclusively is situated above the main spring and flows one and one-half heads of water. A head of water is that quantity which will flow each second through an opening one foot square.

Plaintiff owned surveys Nos. 117, 128, 98 and forty acres of 97, lying on the south side of said creek, all in block No. 13, H. & G. N. R. R. surveys; of which surveys Nos. 97 and 98 are riparian to the said creek, and the other two are not. For many years the plaintiff had appropriated from Toyah creek two and one-half heads of water to irrigate section Nos. 98 and the forty acres of 97 for agricultural purposes, which had been irrigated since 1876 by the Saragosa Irrigation and Manufacturing Company, and the plaintiff, who acquired the land, ditches and canals from the said irrigation and manufacturing company. Since 1892 plaintiff has continuously irrigated parts of sections Nos. 117 and 128 from said creek, having sufficient water to irrigate fourteen hundred acres of land and run a mill, until the year 1902, when the water was so

diminished in quantity that he was compelled to abandon the cultivation of seven hundred acres of land and could not run the mill. One head of water is sufficient to irrigate three hundred acres of plaintiff's land.

In 1875 Daniel Murphy constructed irrigation ditches to the head spring of Toyah creek, so that he diverted one-half of the water of the said spring to the lands hereafter named for irrigation and for agricultural purposes, to wit, to three hundred acres of section No. 256, to sections Nos. 257, 258, 259, 260, 265, and four hundred and twenty-nine acres of section No. 38, and all of Nos. 92 and 52. Plaintiff Clements purchased, at execution sale, all of the said lands, ditches, etc., and in 1901 sold the same to the Watkins Land Company, which company now owns all of the said lands. In the deed from plaintiff to the land company it was specially expressed that the riparian rights of neither party should be affected by that transaction. The land company now diverts from the said creek one-half of the entire flow of the head spring, thereby irrigating twelve hundred acres of land, and it sells water to other parties to irrigate about fourteen hundred acres, to wit: To A. J. Carpenter, seventy-five acres; to W. D. Casey, one hundred and fifty acres; to George Wrens, forty acres; to Jaime, twenty acres; to E. G. Carpenter, two hundred and seventy-five acres, all of which lands are separated from the said Toyah creek. It also furnishes water to the following named parties for the number of acres named, all of which is riparian to the said creek: J. F. Mellier, forty acres; Augustine Hernandez, two hundred and thirty acres; Louis Schertz, forty acres; Bessier and Hogan, thirty acres, and John Moore, two hundred and thirty acres.

In 1879 Daniel Murphy conveyed to S. R. Miller five hundred and twenty-five and one-quarter acres of land out of section No. 256, in the name of Antonio Ball, lying on both sides of Toyah creek; also one-half interest in the head spring, and a line was run east and west through the center of the said spring so as to divide the same equally, and the said Murphy at the same time conveyed to said Miller thirty-six and one-half acres out of section No. 257. Miller constructed ditches and canals on the said land by which he diverted water ¹⁸⁸⁴ from the creek and spring to some of the said lands. C. W. Giffin is now the owner of the land, ditches and rights which formerly belonged to Miller, and Giffin appropriates for agricultural purposes one-half of the water that flows from

the head spring and the entire one and one-half heads which flows from the spring situated above the head spring. The other defendants owned a certain part of section No. 26 and irrigated from Toyah creek about three hundred acres, and have done so for more than ten years.

Of the lands which now belong to the land company the following are not in the watershed of Toyah creek, to wit: Sections Nos. 258, 269, 37, two-fifths of 38, 625, one-half of 92, and all of 52. The following lands which are not within the watershed of Toyah creek, to wit: Sections Nos. 93, 94, 56 and 78 belong to persons who are not parties to this suit.

If the defendants should use only the quantity of water necessary to irrigate their lands and should return the surplus to Toyah creek, by proper means, there would be enough water in the creek to irrigate the lands of Clements, including what he has abandoned.

The judgment of the court of civil appeals enjoins the plaintiffs in error from using the water of Toyah creek and Toyah spring to irrigate undefined parts of a number of surveys. There is an entire want of description of the parts of surveys which are denied the right of irrigation, hence the judgment of the court of civil appeals is so indefinite that it cannot possibly be enforced. The plaintiffs are also enjoined from furnishing water, under existing contracts, to certain persons, who are not parties to this suit. They have the right to be heard upon the questions whether their lands are entitled to the benefits of irrigation. For these reasons the judgment of the court of civil appeals must be reversed, and this cause remanded to the district court for a new trial.

The plaintiffs in error claim that the Watkins Land Company and Giffin each have, by limitation, acquired the right to appropriate exclusively the one-half of the water of Toyah spring. It is true that such a right might be acquired, provided it had been exercised for such length of time and under such circumstances as would bring it within the requirements of the law: *Baker v. Brown*, 55 Tex. 377. But the facts of this case do not establish such right in either of them. Murphy and others, who claimed under him, diverted one-half of the water of Toyah spring for more than ten years; but Clements purchased from Murphy's remote vendee all of the lands now claimed by the land company as well as the one-half of the head spring of the stream; and at the same time, owned the lands which he now claims the right to irrigate,

and thus the right to divert half of the water of the spring, if it existed, was vested in Clements, who sold to the land company, expressly reserving in the deed all riparian rights which belonged to him and specifically providing that the conveyance should in nowise affect his rights as a riparian owner. Ten years have not elapsed since the land company acquired the title from Clements, hence, as against him, there has been ⁵⁸⁵ no adverse possession for a sufficient time to establish the right claimed. The facts do not show that Giffin and those under whom he claims had ever exclusively appropriated one-half of the water from Toyah spring, but the trial court found that he and his vendor had appropriated water from that spring during a certain time for the purposes of irrigation. These facts do not establish in him a right to appropriate one-half of the flow of the spring.

As the case will be remanded for another trial, it is necessary for this court to pass upon the following questions: 1. What lands are riparian within the meaning of the law? and 2. What are the relative rights of riparian owners?

Riparian rights arise out of the ownership of land through or by which a stream of water flows, which rights cannot extend beyond the original survey as granted by the government: 2 Farnham on Waters, sec. 463a, p. 1572; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Boehmer v. Big Rock Irr. Co., 117 Cal. 19, 48 Pac. 908. The rule is well expressed by this language: "The most satisfactory rule is that the parcels of land should be regarded as riparian so far as their location with reference to the stream has indicated where their boundary should be fixed, so that all that parcel which is regarded as one tract should be regarded as riparian, leaving the question of the extent of the use which may be made of the water to the rules regulating the relative rights of owners on the stream. Under this rule the boundary of riparian land is restricted to land the title to which is acquired by one transaction."

Another limitation upon the right of the riparian proprietor is that he cannot ordinarily divert water to land lying beyond the watershed of the stream: 2 Farnham on Waters, 1572; Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442. Conditions might exist that would authorize the court to extend this rule so as to permit water to be carried beyond the watershed; for example, if the drainage area be small and the supply of water abundant, so that other ripar-

ian owners would not be deprived of an ample supply, it might not be an unreasonable use to carry the water beyond the watershed: *Jones v. Conn*, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630.

In all countries and under all circumstances water is necessary for the support of human and animal life and to answer the demands of other domestic uses; therefore the law denominates its use for such purposes as natural, and accords to it preference over the demands of irrigation and manufacturing: *Farnham on Waters*, secs. 600, 601. Subject to the right of natural use by other riparian proprietors, each riparian owner is entitled to use the water of a stream, which flows by or through his land, for the purposes of irrigation; provided such use is reasonable, considering all of the circumstances and conditions under which it is made: *Gould on Waters*, sec. 217; 2 *Farnham on Waters*, sec. 463a; 3 *Farnham on Waters*, sec. 601; 3 *Kent's Commentaries*, 571; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Bullard v. Saratoga Mfg. Co.*, 77 N. Y. 525; *Miller v. Miller*, 9 Pa. St. 74, 49 Am. Dec. 545; *Union etc. Co. v. Ferris*, 2 Saw. 176. In speaking of the right to irrigate, Mr. Gould says: "According to the later decisions in both countries ⁵⁸⁶ (England and America) this is not a natural want authorizing an exclusive or undue appropriation by one proprietor, but the use of the stream for this purpose must be reasonable and must not materially affect the application of the water by other riparian proprietors. The extent of each proprietor's right to thus withdraw the water depends upon the circumstances of the case. The owner of a large tract of porous land abutting on one part of the stream could not lawfully irrigate such land continuously by canals and drains and so cause a serious diminution of the quantity of the water, though there may be no other loss to the natural stream than that arising from the natural absorption or evaporation of the water employed for the purpose." The cases which support the text are numerous, but we think it unnecessary to cite others than those given above. Each riparian owner has equal rights in the stream of water which flows by him, and the use by each must be reasonable as regards the rights of others. It is true that oftentimes it will be found difficult to determine what is a reasonable use of water under existing conditions; however, the same difficulty is encountered by courts in the determination of questions of reasonable conduct on the part of indi-

viduals in every phase of life and in all classes of business, but that constitutes no reason for rejecting the rule which makes reasonable use the standard by which to determine conflicting claims. Courts have ample authority to ascertain the relative rights of riparian owners and to regulate the manner of using the water: *Wiggins v. Muscupiabe etc. Water Co.*, 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; *Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325.

Counsel for plaintiffs in error submit the following proposition and authorities: "The rule of reasonable use of waters of a stream for irrigation purposes does not apply to lands within the arid districts of Texas, but irrigation within such districts is a natural use, and the upper riparian owner has the right to exhaust all the water in the stream, if necessary, for the irrigation of his lands riparian to said stream: *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Tolle v. Correth*, 31 Tex. 362, 98 Am. Dec. 540; *Barrett v. Metcalfe*, 12 Tex. Civ. App. 663, 33 S. W. 758; *Baker v. Brown*, 55 Tex. 377; *Mud Creek Irr. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078." Under this proposition it is insisted that the plaintiffs in error had the right to use all of the water of Toyah spring and Toyah creek, if necessary, to irrigate the lands which they owned.

In *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631, the plaintiff sought to recover damages against the defendant for erecting a dam across San Antonio river, causing the water to flow back upon the lots which belonged to the plaintiff situated upon the said river above the dam. The defendant claimed the right to maintain the dam under a grant from the former government and by a continuous use of that franchise for a period of time which gave a right by prescription. It will be seen from these facts that the right of a riparian owner to exhaust a stream for the purposes of irrigation, and thereby deprive the riparian owner lower on the stream from participation in its water was not involved in that case. Judge Moore discussed ⁵⁸⁷ many phases of irrigation, both under the common law and the civil law, and finally made this statement: "It may be admitted that the purpose of irrigation is one of natural use, such as thirst of people and cattle and household purposes which must absolutely be supplied; the appropriation of the water for this purpose would, therefore, afford no ground of complaint by the lower proprietors, if it were entirely consumed." The facts of the case did not raise

the issue of the right to appropriate the water for purposes of irrigation, and the statement by Judge Moore, as above quoted, is obiter dictum. In support of that statement, Judge Moore referred to *Evans v. Merriweather*, 3 Scam. 492, 38 Am. Dec. 106. In that case the supreme court of Illinois distinguished clearly between a natural use and irrigation by this language: "From these premises would result this conclusion: that an individual owning a spring on his land, from which water flows in a current through his neighbor's land, would have the right to use the whole of it, if necessary, to satisfy his natural wants. He may consume all the water for his domestic purposes, including water for his stock. If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not supply water more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufactures. So far, then, as natural wants are concerned, there is no difficulty in furnishing a rule by which riparian proprietors may use flowing water to supply such natural wants. Each proprietor in his turn may, if necessary, consume all the water for these purposes. But where the water is not wanted to supply natural wants, and there is not sufficient for each proprietor living on the stream, to carry on his manufacturing purposes, how shall the water be divided? We have seen that without a contract or grant neither has a right to use all the water; all have a right to participate in its benefits. Where all have a right to participate in a common benefit, and none can have an exclusive enjoyment, no rule, from the very nature of the case, can be laid down as to how much each may use without infringing upon the rights of others. In such cases the question must be left to the judgment of the jury, whether the party complained of has used, under all the circumstances, more than his just proportion." It is fair to presume that Judge Moore intended to express only that for natural uses the supply might be exhausted, for he does not assert that irrigation is a natural use.

In *Tolle v. Correth*, 31 Tex. 362, 98 Am. Dec. 540, the opinion was delivered by Chief Justice Morrill, who stated the question for decision thus: "The question for adjudication is, whether a proprietor of a tract of land in which originates a

spring, forming a stream, running in a channel through his land and into the land of another person, has a right to divert the stream from the natural channel and cause it to overflow and irrigate the land, provided ⁵⁸⁸ the stream resumes its original channel before it enters the land of the adjacent proprietor?" From this statement it is plain that the relative rights of riparian owners were not in the mind of the court, which is made more manifest by this concluding paragraph of the opinion: "We would not be understood as deciding to what extent a stream can be used for irrigation purposes. The relative rights or exclusive rights are not before us." In that case the issue was between the owner of a spring who used the water for irrigation and the owner of a mill situated lower down upon the stream who denied the right of the owner of the spring to divert the water from its ordinary channel for irrigation purposes, and the court held that for irrigation he had such right. The judge who delivered that opinion copied from *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631, the expression used by Judge Moore as hereinbefore quoted, but all that was said in that opinion upon the subject of the relative rights of riparian owners was beyond the scope of the case.

Baker v. Brown, 55 Tex. 377, involved a controversy between riparian owners as to the right of the upper owner to exhaust the stream for irrigation, depriving the lower owner of water for his natural uses. Judge Bonner stated the question to be decided thus: "The gravamen of plaintiff's action was that the defendants, who were riparian proprietors above him on Simpson's creek, had, by irrigating their lands from the creek, stopped the flow of water and caused it to stand in holes along and by his lands, and had deprived him of its use to supply the natural wants of his tenants and stock, and had caused noxious and disagreeable smells and malarial diseases along his lands and in the neighborhood." It was there held that the use for irrigation was subordinate to the use for domestic purposes, which involved the holding that irrigation is not a natural use. Since such proprietor may, if necessary, exhaust the supply in a domestic use, to hold that he could not do so for irrigation was to decide that irrigation is not a natural use. Judge Bonner was chief justice of the court when that case was decided.

Barrett v. Metcalfe, 12 Tex. Civ. App. 663, 33 S. W. 758, was a suit between a corporation and riparian owners upon

the Concho river, in which the corporation insisted that, by reason of its organization under the laws of the state, it acquired the right to appropriate the waters of Concho river, and having first made the appropriation of such waters, the riparian owners above did not have authority to make use of the waters of that stream for irrigation without compliance with the laws of the state upon that subject. The case was presented to this court on application for writ of error, based alone upon the proposition that, by virtue of the law under which the corporation was organized, it had the right to appropriate the water of the river to the exclusion of any riparian owner who might claim the use of the water except through compliance with the terms of the statute. The relative rights of riparian owners were not involved in that case.

Mud Creek Irr. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078, is much relied upon to support the plaintiff's contention. In that case a corporation, organized ⁵⁸⁹ for irrigation purposes under a statute of this state, claimed the right to use the water of a stream to the exclusion of those who owned land above its dam. The corporation did not claim as a riparian owner, but strictly under the statute. It alleged no ownership of any land which was riparian in character. Judge Gaines stated the issue made by the allegations of the petition, to which a demurrer was sustained, in the following language: "But it is to be noted that while it may be suspected that the plaintiff is the owner of land abutting upon the stream and perhaps crossing it, it is nowhere distinctly alleged that such is the fact, nor is it averred that it has acquired any right in the water by purchase or condemnation from any riparian proprietor. The action, judging from the averments in the petition, seems to be based in part upon the theory that the charter of the company by designation of the locality of the canal gave it the exclusive right of the water for irrigating purposes in that locality. This we think a mistake." Judge Gaines then proceeded to the discussion of the rights of the corporation under the statute, holding that it acquired no such rights by virtue of its incorporation. In connection with this discussion Judge Gaines uses language which might be construed, if disconnected from the facts of the case, as putting irrigation upon the same basis as the use for domestic purposes which is misleading as to the point decided. The following language in which the conclusion of the court was announced should be referred to the facts of the case, and not

to the remarks as to the character of the use of water for irrigation. The judge said: "We think, therefore, that the defendants had the right to divert the water which flowed in the stream along or through their lands for the purpose of irrigating them, although the effect of such use was to leave the plaintiff corporation an insufficient supply for the same purpose." In any view of that case the question here at issue was not involved and was not decided.

There has been no case decided by the supreme court of this state, or in which it has refused an application for writ of error from the court of civil appeals, which is authority for the proposition contended for by the plaintiffs in error.

Plaintiffs have not the right to apply all of the water flowing from Toyah spring or along that creek to their riparian lands, but have a right in common with others to make a reasonable use of the water. Neither have they the right to appropriate any of that water to nonriparian land which they may own, although it may adjoin land owned by one of them which is entitled to the use of the water: *Boehmer v. Big Rock Irr. Dist.*, 117 Cal. 19, 48 Pac. 908. Nor has either of them the right to sell water to others to irrigate lands not riparian: *Oremrod v. Todmorden*, L. R. 11 Q. B. D. 162, 52 L. J. Q. B. 445, 31 Week. Rep. 759, 47 J. P. 532; *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538.

This opinion does not apply to irrigation where the water is appropriated by condemnation proceedings under statutes regulating such proceedings, ⁵⁹⁰ nor to lands which may have been granted or sold by the state since those statutes were enacted, which declare certain waters to belong to the public.

The judgment of the court of civil appeals is reversed and the cause is remanded to the district court.

The Principles Involved in the principal case will be found considered in *Crawford Co. v. Hathaway*, 67 Neb. 325, 108 Am. St. Rep. 647, and cases cited in the cross-reference note thereto; *Meng v. Coffee*, 67 Neb. 500, 108 Am. St. Rep. 697, and cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
UTAH.

HARKNESS v. GUTHRIE.

[27 Utah, 248, 75 Pac. 624.]

CORPORATIONS—Inspection of Books.—The Right of a Stockholder to inspect the books of the corporation is a common-law right and, unless restricted by charter or statute, will not be denied when sought for a proper purpose. (pp. 665, 666.)

CORPORATIONS—Inspection and Visitation.—The right of visitation as applied to private corporations, and the right of inspection by stockholders, are not one and the same thing. (p. 666.)

CORPORATIONS—Inspection of Books of National Bank.—The stockholders in a national bank have a common-law right to inspect its books, and this right is not abridged by a provision of a state statute that "all books of any corporation shall at all reasonable hours be subject to the inspection of any bona fide stockholder," nor by a provision of the national bank act that "no association shall be subject to any visitorial powers other than such as are authorized by this title or are vested in courts of justice." (p. 667.)

Heywood & McCormick, for the appellants.

Henderson & Macmillan, for the respondent.

249 BASKIN, C. J. On the application of the plaintiff, an alternative writ of mandamus was issued, commanding the defendants to permit the plaintiff to inspect all of the books, accounts, and loans of the Commercial National Bank of Ogden City, Utah, or show cause on the twenty-fifth day of April why they had not done so. On the day mentioned the defendants appeared, and, in answer to plaintiff's affidavit and the alternative writ, alleged: "(1) that this court has no jurisdiction to hear or determine any of the matters complained of by plaintiff, or any issue that could be joined thereby; (2) that the matters complained of by plaintiff do not constitute a cause of action

(664)

of any kind against these defendants, or any of them; (3) that the plaintiff is not entitled to the relief prayed for in his said action, or any relief, and that the court has no jurisdiction to grant the relief which plaintiff seeks."

The material facts alleged in the affidavit of the plaintiff upon which the alternative writ was issued, and upon which at the hearing a mandatory writ was granted, are as follows: That the defendants are the officers of the bank, and that the books, accounts, and notes are in possession and under control of defendants; that the plaintiff is a stockholder in said bank, and, as such, "on or about the first day of February, 1903, made a demand upon said directors, and also upon said J. W. Guthrie, as president, A. R. Heywood, as vice-president and general manager of said bank, and also upon R. T. Hume, as assistant cashier of said bank, for permission to permit affiant to inspect all books, accounts, and loans of said bank, and affiant made demand for such inspection at such time or times as would not interfere with the proper conducting and operating of said bank; that each and all of said persons refused permission to affiant to inspect the books, accounts, and loans of said bank at any time or at all, and still refuses to permit such inspection; that he seeks this inspection for the purpose of ascertaining the value of his stock in said bank, and for the purpose of ascertaining ²⁵⁰ whether the business affairs of said bank have been properly conducted according to law; that loans have been made to a favored few of the patrons of said bank of more than one-tenth of the capital stock to each of said patrons, which is contrary to law; and that he believes the said directors and officers of said bank have been guilty of other irregularities, which can only be stated after an inspection of the books, accounts and loans of said bank."

The only question involved is shown by the following quotation from appellant's brief, to wit: "At the trial the only issue presented was whether a stockholder of a national bank created and controlled by acts of Congress possesses the same powers and rights of access to and inspection of the books as are possessed by the stockholders of other corporations."

The right of inspection is a common-law right, and, unless restricted by statute or the corporation's charter, will

not be denied when sought by a stockholder for a proper purpose. The provision that "all books of any corporation shall at all reasonable hours be subject to the inspection of any bona fide stockholder," contained in section 329 of the Revised Statutes of Utah of 1898, does not restrict the common-law right, but is in harmony therewith. Therefore, unless, as claimed by appellants' counsel, inspections of the character sought in this case are prohibited by the following provisions of the national bank act (U. S. Rev. Stats., sec. 5241; U. S. Comp. Stats. 1901, p. 3517), viz.: "No association shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in courts of justice"—the writ in question was properly granted. Visitorial powers and the stockholders' right of inspection are not one and the same thing. In 7 American and English Encyclopedia of Pleading and Practice, 855, visitation of corporations is correctly defined, and its purposes aptly stated as follows: "By 'visitation of corporations' is meant the act of examining into its affairs. The person authorized to make such examination is called the visitor. The purpose ²⁵¹ of visitation is to supervise, direct and control the management of the corporation." Numerous cases and authorities are cited which support the text. See, also, text and cases cited in 1 Abbott's Digest of Law of Corporations, 873. The visitorial power over private eleemosynary corporations vests in the founder or his heirs, but they may appoint others to act. In the United States visitorial power over all except private eleemosynary corporations existing under and by virtue of the laws of a state vests in the state, and as to those formed under an act of Congress, it vests in the general government, and is exercised through the medium of the courts, or by visitors appointed for that purpose by or in pursuance of statutes. It is correctly stated in Merrill on Mandamus, section 175, that "visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings. In America there are very few corporations which have private visitors, and, in the absence of such, the state is the visitor of all corporations." The common-law right of inspection by the stockholder is a personal privilege arising from his ownership of stock of

the corporation, and can be exercised for any legitimate purpose beneficial to him, without any special appointment for that purpose; but he cannot, in its exercise, as the state through the medium of the courts or a visitor may do, interfere with or direct the general operations of the corporation. The difference between the visitorial powers over corporations and the stockholder's right of inspection is obvious. We are clearly of opinion that section 5241 of the Revised Statutes of the United States, before quoted, does not apply to, or in any way affect, the common-law right of stockholders: *Winter v. Baldwin*, 89 Ala. 483, 7 South. 734; *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761.

The judgment granting the writ of mandamus is affirmed, with costs.

Bartch and McCarty, JJ., concur.

The Principal Case was Affirmed by the Supreme Court of the United States (*Guthrie v. Harkness*, 199 U. S. 148, 26 Sup. Ct. Rep. 4), Mr. Justice Day delivering the opinion of the court as follows: "The defendant in error was the owner of nearly one-fifth of the capital stock of the Commercial National Bank of Ogden, Utah. As such shareholder he applied for leave to inspect the books, accounts, and loans of the bank, which was refused him. He alleges the reasons for seeking such inspection to be that he might ascertain the value of his stock in the bank, and whether the business affairs of the same had been conducted according to law. He charged that loans had been made to patrons of the bank of more than one-tenth of the capital stock, in violation of law, and that an inspection of the books, accounts, and loans of the bank would reveal other irregularities. Upon the hearing of the district court the following findings of fact were made:

"1. That the Commercial National Bank of Ogden, Utah, is a corporation organized and existing under and by virtue of the laws of the United States; that said corporation is doing a banking business in Ogden City, Weber county, state of Utah; that the capital stock of said bank is one hundred thousand dollars, divided into one thousand shares of the par value of one hundred dollars per share.

"2. That the defendants are directors and have under their control and in their possession all books, papers, accounts, and loans of said Commercial National Bank.

"3. That there is no acting cashier of said bank, and that there has been no such cashier since the first day of November, 1902; that J.

W. Guthrie is president, A. R. Heywood, vice-president, and R. T. Hume is assistant cashier of said bank.

“4. That on or about the first day of February, 1903, plaintiff made a demand upon said directors, at the banking house of said bank, and also upon J. W. Guthrie, as president, A. R. Heywood, as vice-president and general manager of said bank, and upon R. T. Hume, as assistant cashier of said bank, for permission to permit plaintiff to inspect all books, accounts, and loans of the said bank, and plaintiff made demand for such inspection at such time or times as would not interfere with the proper conducting and operating of said bank.

“5. That each and all of said persons refused permission to plaintiff to inspect the said books, accounts, and loans of said bank at any time or at all, and they still refuse to permit such inspection.

“6. That the plaintiff is the owner and has in his possession one hundred and eighty-three and one-third shares of the capital stock of said bank, of the par value of eighteen thousand three hundred and thirty-three dollars and thirty-three cents, and that said stock appears on the stock-books of said bank in the name of the said plaintiff.

“7. That plaintiff sought and now seeks the inspection of the books, accounts, and loans of said bank for the purpose of ascertaining the true financial condition of said bank, and also for the purpose of ascertaining the value of his stock in said bank, and also for the purpose of ascertaining whether the business affairs of the said bank have been conducted according to law.

“The court further finds that sufficient reason exists for the inspection of said books and accounts of said bank.

“Upon this finding the court entered a judgment requiring the defendants to permit the plaintiff to inspect the books, accounts, and loans of the bank at such time or times as would not interfere with the business of the bank.

“While the state has no power to enact legislation contravening the federal laws for the control of national banks (*Davis v. Savings Bank*, 161 U. S. 275, 16 Sup. Ct. Rep. 502, 40 L. ed. 700), Congress has provided that, for actions against them at law or in equity, they shall be deemed citizens of the state in which they are located, and that in such cases the circuit and district courts of the United States shall have such jurisdiction only as they would have in cases between individual citizens of the same state: 25 Stats. at Large, 433. If the stockholders had the legal right to enforce inspection, there is no room to question the authority of the state courts to enforce the right, granting the proper relief in a judicial proceeding: *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 12 Sup. Ct. Rep. 325, 35 L. ed. 1144; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 24 Sup. Ct. Rep. 54, 48 L. ed. 119.

“Upon review in the supreme court of Utah, the judgment of the district court was affirmed, it being held that it was the common-law right of the shareholder to have the inspection demanded, and that the same had not been cut down by the act of Congress regulating the business of national banks: *Harkness v. Guthrie*, 27 Utah, 248, ante, p. 664, 75 Pac. 624.

“There can be no question that the decisive weight of American authority recognizes the common-law right of the shareholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member.

“Morawetz, in his work on Private Corporations, section 473, volume 1, says: ‘However, in the United States the prevailing doctrine appears to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company’s books, although they have no power to interfere with the management.’

“In many of the states this right has been recognized in statutes, which are generally held to be merely in affirmance of the common law. Nor do we find the authorities making an exception as to this right when a corporation which does a banking business is the subject of consideration. It is said to be customary for banking companies in England to insert in their constitutions a provision forbidding the inspection of customers’ accounts by shareholders or creditors: *Morgan’s Case* (1885), L. R. 28 Ch. Div. 620; *Cook on Corporations*, sec. 517, note. The subject appears to be now regulated by statute in England; *Cook on Corporations*, sec. 518. In *Cockburn v. Union Bank*, 13 La. Ann. 289, it was held that a stockholder in the Union Bank of Louisiana had the right to a writ of mandamus to compel the officers of the bank to allow him the privilege of inspecting the discount books of the bank within proper and reasonable hours, and in the course of the opinion it was said: ‘A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by the charter or the law of the land; as long as the charter, or the rules and by-laws passed in conformity thereto, and the law, do not restrict his individual rights, he possesses them in full, and can demand to exercise them. It cannot be denied that it is the right of everyone to see that his property is well managed, and to have access to the proper sources of knowledge in this respect.’

“This case was cited with approval in *State v. Citizens’ Bank*, 51 La. Ann. 426, 25 South. 318, and *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761. In the latter case it was said: ‘The principle upon which a stockholder is allowed access to the books of a corporation is as applicable to the case of a banking corporation as it is to any other kind of corporation.’

“In *State v. Laughlin*, 53 Mo. App. 542, a stockholder in an incorporated bank had been denied by the directors the right to inspect the books for the purpose of acquainting himself with the conduct of its affairs and to learn how it was managed. The court there held that he was entitled to a writ of mandamus to compel the inspection, and this, notwithstanding the bank contended that it occupied such a confidential and trust relation to its customers and depositors, that it would be a breach of duty on its part to open up the books to the inspection of the relator. The authorities are fully examined, and the right of the shareholders to inspect the books for proper purposes and at proper times is recognized in *In re Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; *Commonwealth v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184. To the same effect are *Deaderick v. Wilson*, 8 Baxt. 108; *Lewis v. Brainerd*, 53 Vt. 519; *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274.

“In the latter case it was said: ‘Stockholders are entitled to inspect the books of the company for proper purposes at proper times and they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders.’

“The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders, who are the real owners of the property: *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732.

“It is suggested in argument that, if the shareholder has the right, it may be abused, in that he may make an improper use of the knowledge thus gained. There is nothing in this record, however, to suggest, by way of argument or testimony, that the shareholder desired the information which the books would give for other than a lawful purpose. On the other hand, there is a distinct finding that the inspection was desired for the purpose of ascertaining the true financial condition of the bank, and for the purpose of enabling the complainant to find out the value of his stock, and whether its business was being conducted according to law. There is no suggestion that the complainant was acting in bad faith or from improper motives, or that he was seeking in any way to misuse the information which the books would afford him. We need not hold that there may not be

circumstances which would justify the courts in withholding relief to a stockholder seeking an examination of the books and accounts of the bank. In the case before us no reason is shown for denying to the stockholder the right to know how his agents are conducting the affairs of a concern of which he is part owner. Many legal rights may be the subjects of abuse, but cannot be denied for that reason. A director, who has the right to an examination of the books, may abuse the confidence reposed in him. Certainly this possibility will not be held to justify a denial of a legal right, if such right exists in the shareholder. The possibility of the abuse of a legal right affords no ground for its denial: *State v. Laughlin*, 53 Mo. App. 542; *People v. Goldstein*, 37 App. Div. 550, 56 N. Y. Supp. 306. The textbooks are to the same effect as the decided cases: *Cook on Stocks and Stockholders*, sec. 511; *Boone on Banking*, sec. 235; *Angell and Ames on Private Corporations*, 607.

“It does not follow that the courts will compel the inspection of the bank’s books under all circumstances. In issuing the writ of mandamus the court will exercise a sound discretion, and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes, or to gratify idle curiosity, or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes: *In re Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; *Thompson on Corporations*, sec. 4412 et seq.

“We are unable to find in section 5211 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 3498), requiring reports to be made to the comptroller of the currency, or section 5240 of the United States Compiled Statutes of 1901, page 3516, providing for the appointment of examiners to investigate the condition of national banks, anything which cuts down the usual common-law right in shareholders in such corporations.

“In section 5210 of the United States Compiled Statutes of 1901, page 3498, it is provided that a list of shareholders shall be kept, subject to inspection by the shareholders and creditors of the corporation and the officers authorized to assess taxes under state authority. The purpose of this section seems obvious in view of the other provisions of the statute, authorizing taxation by the state, upon the shareholder (U. S. Comp. Stats. 1901, sec. 5219, p. 3502), and providing for the individual liability of the shareholder to an amount equal to his stock, in cases of insolvency: See U. S. Comp. Stats. 1901, sec. 5151, p. 3465.

“This court has said that one, if not the principal, object of this section was to acquire information as to the shareholders upon whom may rest individual liability for contracts, debts, or other engagements of the bank: *Pauly v. State Loan etc. Co.*, 165 U. S. 606, 17 Svp. Ct. Rep. 465, 41 L. ed. 844.

“It is true that for some purposes a national bank is a public institution, notwithstanding it is the subject of private ownership. It may issue bills, which circulate as part of the currency of the country. It is subject to examination, and, in a large measure, to the supervision of the comptroller of the currency. It is examined at stated periods, and may be the subject of special examination by order of the comptroller. But it is owned by shareholders, like other banking institutions. It is subject by statute to be sued in the courts of the state: 25 Stats. at Large, 433, c. 866; U. S. Comp. Stats. 1901, p. 508. There is nothing in the banking act, as we read it, which limits a shareholder or shareholders, seeking knowledge for a lawful purpose of an institution in which they have a proprietary interest, to an application to the comptroller for an examination by a public officer of the affairs of their company. A director need only own ten shares of the stock: Rev. Stats., sec. 5146; U. S. Comp. Stats. 1901, p. 3463. The directors together need not necessarily own the controlling interest in the bank. Yet it is contended that they, or the officers of their choice, may deny stockholders the privilege of inspecting, for legitimate purposes, the property which belongs to them.

“But, it is said, the right of the shareholder to inspect the books is cut off by section 5241 of the United States Compiled Statutes of 1901, page 3517, providing ‘no association shall be subject to any visitorial powers other than such as are authorized by this title or are vested in the courts of justice.’ We are unable to find any definition of ‘visitorial powers’ which can be held to include the common-law right of the shareholder to inspect the books of the corporation.

“Visitation is defined by Bouvier (Bouvier’s Law Dictionary, vol. 2, p. 1199), as follows: ‘The act of examining into the affairs of a corporation.’ The power of visitation is applicable only to ecclesiastical and eleemosynary corporations: 1 Blackstone’s Commentaries, 480. The visitation of civil corporations is by the government itself, through the medium of the courts of justice: See 2 Kent’s Commentaries, 240. In the United States, the legislature is the visitor of all corporations founded by it for public purposes: Dartmouth College Case, 4 Wheat. 673, 4 L. ed. 629.

“The origin and nature of visitorial power received full discussion in the case cited by Bouvier from 4 Wheaton: See opinion of Mr. Justice Story in Dartmouth College Case, 4 Wheat. 673, 4 L. ed. 668.

“The meaning of this section was before Judge Baxter in the case of First Nat. Bank v. Hughes, 6 Fed. 737, and of the meaning of the term ‘visitorial powers,’ as used in section 5241, that learned judge said: ‘Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. Burrill defines the word to mean ‘inspection; superintendence; direction; regulation.’

“At common law the right of visitation was exercised by the king as to civil corporations, and as to eleemosynary ones by the founder or donor: 1 Cooley’s Blackstone, 481. ‘In the United States the legislature is the visitor of all corporations created by it, where there is no individual founder or donor, and may direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause a forfeiture of their charters’: 1 Cooley’s Blackstone, 482, note.

“In the case before us the supreme court of Utah quotes from Merrill on Mandamus, as follows: ‘Visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings. In America there are very few corporations which have private visitors, and, in the absence of such, the state is the visitor of all corporations.’

“In no case or authority that we have been able to find has there been a definition of this right which would include the private right of the shareholder to have an examination of the business in which he is interested, and the right of discovery of the methods and means by which the agents of the corporation are conducting its affairs. The right of visitation, being a public right existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind, in passing this section, that in other sections of the law it had made full and complete provision for investigation by the comptroller of the currency and examiners appointed by him, and authorizing the appointment of a receiver to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

“That the statute did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice to enforce such recognized rights as are here involved, is evident from the language used. If the right to compel the inspection of books was a well-recognized common-law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class ‘vested in courts of justice’ which are expressly excepted from the inhibition of the statute.

“Finding nothing in the act of Congress limiting the common-law right of the shareholder, we think that, under the circumstances of this case, he was wrongfully denied an inspection of the books and accounts of the bank by its officers, and the judgment of the supreme court of Utah is affirmed.”

THE RIGHT OF A STOCKHOLDER TO INSPECT THE BOOKS OF HIS CORPORATION AND THE REMEDIES FOR ITS ENFORCEMENT.

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I. Right of Inspection in General.

a. As Distinguished from Visitation.—The right of inspection and the right of visitation, as applied to private corporations, are not one and the same. The right of visitation, except in the case of a few institutions which have private visitors, is a public right, exercised by the government for the purpose of supervising the management of corporations and keeping them within the limits of their legitimate powers; but the right of inspection is the personal privilege of every stockholder, existing by virtue of his ownership of stock, to be exercised by him for the purpose of ascertaining such information as he is entitled to in relation to the corporate business and affairs, with a view to the intelligent exercise of his rights as a shareholder and the protection of his interest, in the corporation. Hence it is that the provision of the national bank act that “no association shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in courts of justice,” does not

abridge the common-law right of stockholders in a national bank to inspect its books and papers: See the principal case, ante, p. 664.

b. **As Given by Common Law.**—The right of a stockholder to inspect the books, papers, and records of his corporation, at seasonable times and for proper purposes, is a common-law right. It is not, however, an absolute right, but only a qualified one. Its recognition cannot be compelled, except when the demand is made in good faith and for a legitimate purpose, such as to obtain information of how the corporate affairs are being conducted and thereby enable him to protect his interests and intelligently perform his duties as a shareholder. While courts enforce this right, they do not do so as a matter of course, but only in their discretion in a proper case and for a proper purpose: *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *Bruning v. Hoboken Printing etc. Co.*, 67 N. J. L. 119, 50 Atl. 906; *O'Hara v. National Biscuit Co.*, 69 N. J. L. 198, 54 Atl. 241; *Legendre v. New Orleans Brewing etc. Assn.*, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 South. 837; *In re Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; *Deaderick v. Wilson*, 8 Baxt. 108; *State v. Pacific Brewing etc. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; *Mutter v. Eastern etc. Ry. Co.*, 38 Ch. Div. 92.

The right of stockholders to inspect the books of their corporation rests on the fact of ownership. The books and property of the corporation really belong to the shareholders, and the reality cannot be overthrown by the fiction of law that a corporation is an artificial person or entity apart from its members. Those in charge of the concern are merely the agents of the stockholders. With reference to his right of inspection, the relation of a stockholder to his corporation has been well likened to that of a partner to the firm: *State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556, 22 South. 815; *State v. Whited*, 104 La. 125, 28 South. 922; *Commonwealth v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184; *State v. Pacific Brewing etc. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; *Guthrie v. Harkness*, 199 U. S. 148, ante, p. 667, 26 Sup. Ct. Rep. 4.

c. **As Affected by Statutes or Constitutions.**—In many of the states the statutes give stockholders in a corporation a right to inspect its books and papers. It is sometimes said of these statutes that they are merely declaratory of the common law: See *Guthrie v. Harkness*, 199 U. S. 148, ante, p. 667, 26 Sup. Ct. Rep. 4. It is generally conceded, however, that they materially enlarge and extend the common-law rule, and do not simply affirm it: *Cobb v. Lagarde*, 129 Ala. 488, 30 South. 326; *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732. The Alabama statute declares that "the stockholders of all private corporations have the right of access to, of inspection and examination of, the books, records, and papers of the corporation, at reasonable times." And in

construing this provision in *Foster v. White*, 86 Ala. 467, 6 South. 88, Justice Clopton observed: "We do not concur in the proposition that the statute is merely declaratory of the common law. . . . The statute was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right; and the purpose is to protect small and minority stockholders against the mismanagement and faithlessness of agents and officers, by furnishing mode and opportunity to ascertain, establish, and maintain their rights, and to intelligently perform their corporate duties. Its terms are clear and comprehensive, and afford narrow room for construction. It was intended to enlarge and disembarrass the exercise of the right, rendering it consistent and coextensive with the stockholder's right, as a common owner of the property, books, and papers of the corporation, and with the duties and obligations of the managing officers, as agents and trustees. The only express limitation is, that the right shall be exercised at reasonable and proper times. The implied limitation is, that it shall not be exercised from idle curiosity or for improper or unlawful purposes. In all other respects the statutory right is absolute." This doctrine is approved in *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; and in *Weinhenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446, in which last case Justice Bryan remarked: "The right is given to him as a stockholder by statute, and is absolute, and not made to depend upon any circumstance but the ownership of the stock. It is easy to see that there might be good reasons for refusing an application; for instance, if it were made for some evil, improper, or unlawful purpose. And, if such purpose were alleged and proved, the writ would be denied."

Statutes giving the right of inspection clearly do not abridge that right as it existed at the common law: See the principal case, ante, p. 667; *In re Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461. This is true of a statute requiring the transfer-books of corporations to be open for inspection during business hours for twenty days previous to elections: *State v. Laughlin*, 53 Mo. App. 542.

The constitutions of some of the states secure to stockholders the right to inspect the books and papers of their corporations: *State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556, 22 South. 815. See, too, *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

d. **As Regulated by Charter or By-laws.**—The statement is sometimes met with, that the common law gives a stockholder the right to inspect the books of his company, unless the charter or by-laws otherwise provide: See the principal case, ante, p. 665; *Commonwealth v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184; *Ranger v. Champion Cotton-Press Co.*, 51 Fed. 61. It is true that the right may be regulated by the by-laws of the corporation, but such regulations must be reasonable (*Cockburn v. Union Bank*, 13 La. Ann. 289; *State v. Laughlin*, 53 Mo. App. 542), and subordinated to the provisions of the

charter and the general and fundamental law: *State v. Citizens' Bank*, 51 La. Ann. 426, 25 South. 318. A by-law closing transfer-books thirty days before an election does not close them against inspection. A contrary interpretation would render it invalid: *State v. St. Louis etc. Ry. Co.*, 29 Mo. App. 301. And a clause in the charter of a corporation that all the powers of the company shall be exercised by a board of directors, does not deprive a stockholder of his right personally to inspect the books and papers of the corporation: *State v. Bienville Oil Works Co.*, 28 La. Ann. 204. The right to examine the books of a foreign corporation doing business in the state is not affected by a provision in its charter or by-laws that differences between the company and its shareholders shall be submitted to arbitration: *State v. North American Land etc. Co.*, 106 La. 621, 87 Am. St. Rep. 309, 31 South. 172.

II. Circumstances Affecting Right.

a. **Motive or Purpose of Inspection.**—Where the right of a stockholder to inspect the books and records of his company has not been enlarged by statute, it can be exercised only in good faith and for some just, useful or reasonable purpose. The right will not be enforced by courts for speculative purposes or to gratify idle curiosity, when the interests of the stockholder and their protection are not involved. The enforcement of the right is limited by some regard for the interests of the corporation and of the other stockholders: *State v. Pan-American Co.* (Del. Super. Ct.), 61 Atl. 398; *Hatch v. City Bank*, 1 Rob. (La.) 470; *Legendre v. New Orleans Brewing Assn.*, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 South. 837; *Bruning v. Hoboken Printing etc. Co.*, 67 N. J. L. 119, 50 Atl. 906; *People v. American Union Life Ins. Co.*, 31 Misc. Rep. 617, 64 N. Y. Supp. 916; *Latimer v. Herzog T. Co.*, 78 N. Y. Supp. 314, 75 App. Div. 522; *Colwell v. Colwell Lead Works*, 76 App. Div. 615, 78 N. Y. Supp. 607; *Phoenix Iron Co. v. Commonwealth*, 113 Pa. St. 563, 6 Atl. 75; *Commonwealth v. Empire Pass. Ry. Co.*, 134 Pa. St. 237, 19 Atl. 629; *Lyon v. American Screw Co.*, 16 R. I. 472, 17 Atl. 61.

It will not be presumed, however, when a request for inspection is made that the motive of the stockholder is an improper one, or that his purpose is other than in the interest of the corporation; and if the motive or purpose is charged to be otherwise, the burden is on the officers refusing the request or the corporation to establish it: *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *State v. Pacific Brewing Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. He is not required, in his petition for a writ of mandamus to enforce his statutory right of inspection, to negative an improper or unlawful purpose: *Cobb v. Lagarde*, 129 Ala. 488, 30 South. 326. Although in the absence of a statute, it is said that a proper and specific purpose must appear in the proofs on an application for the writ, or it

will be denied: *Bruning v. Hoboken Printing etc. Co.*, 67 N. J. L. 119, 50 Atl. 906.

The right of inspection may be exercised, although the only object of the stockholder is to ascertain whether the affairs of the corporation have been rightly conducted by the directors or managers: *Huylar v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274; *State v. Pacific Brewing etc. Assn.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. It may also be exercised to ascertain the value of his shares: *Garcin v. Trenton Rubber Mfg. Co.* (N. J. L.), 60 Atl. 1098; *Neubert v. Armstrong Water Co.*, 211 Pa. St. 582, 61 Atl. 123. It is no defense to the enforcement of the right of inspection, that the corporation is ready to purchase the shares of the stockholder: *State v. St. Louis etc. Ry. Co.*, 29 Mo. App. 301.

Where the right of a stockholder to inspect the books of the corporation is declared by statute, his motive in exercising the right is generally not a subject for judicial inquiry. He may demand an examination without disclosing his reasons or purposes. Probably, however, the courts have power to prevent him from abusing his privilege, and to protect the interests of the corporation and other shareholders: See *Cobb v. Lagarde*, 129 Ala. 488, 30 South. 326; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *State v. St. Louis etc. Ry. Co.*, 29 Mo. App. 301; *State v. Sportsman's Park Assn.*, 29 Mo. App. 326; *People v. Goldstein*, 37 App. Div. 550, 56 N. Y. Supp. 306; *In re Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732.

In construing the Alabama statute on this question, Justice Clifton in *Foster v. White*, 86 Ala. 467, 6 South. 88, said: "The only express limitation is that the right shall be exercised at reasonable and proper times. The implied limitation is that it shall not be exercised from idle curiosity or for improper or unlawful purposes. In all other respects the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an examination opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has any reason to believe that they are improper or illegitimate, and refuses the inspection on that ground, he assumes the burden to prove them as such. If it be said that this construction of the statute places it in the power of a single shareholder to greatly impede and injure the business, the answer is, the legislature regarded his interests in the successful promotion of the objects of the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded on the principle that the shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed."

And in considering the statutory and constitutional provisions of California, Commissioner Cooper, in *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050, said: "At common law the stockholders of a corporation had the right to examine, at reasonable times, the records and books of the corporation. But the writ [of mandamus] would not issue as a matter of course to enforce a mere naked right, or to gratify mere idle curiosity, but it was necessary for the petitioner to show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination was desired. But the great weight of the American authorities is to the effect that where the right is statutory it is not necessary for the petitioner to aver or show the purposes or object of the inspection. Neither is it any defense to allege that the objects and purposes are improper, and that the petitioner desires to injure the business of the corporation. The clear legal right given by the constitution and the statute cannot be defeated by stopping to inquire into motives. If this were so, the stockholder would be driven from the certain definite right given him by the statute to the realm of uncertainty and speculation. . . . The statute is founded upon the principle that the shareholders have a right to be fully informed as to the conditions of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed. The shareholder is not required to show any reason or occasion for making the examination. Nor can he be met with the defense that his motives are improper. It may be conceded that cases may arise in which a small stockholder, largely interested in some other corporation, desires the information for improper purposes. But we cannot presume such motive or purpose, nor can we allow it as a defense to an application for a writ of mandate. We must presume that the owner of a part of the stock of a corporation is interested in its welfare and prosperity; that he desires to know the condition of its business affairs, for the same reason that any prudent business man would desire to know the condition and management of his private affairs. If the corporation might be injured in certain cases, it is no more than is often the case with private owners of property. The law will presume any damage done by a stockholder to the corporation of which he is a member can be recovered in an action at law. When a case arises in which the stockholder has obtained information of a secret nature, and furnished it to a rival company or corporation, to the injury and damage of the corporation from whom the information is obtained, it will be time to deal with it. We do not think public policy demands that such defense can be made to a clear legal right."

The argument was made in *State v. Pacific Brewing etc. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208, that the managers of a rival concern might acquire stock in a corporation, and exercise the right

of inspection for the purpose of benefiting the rival company to the detriment of the other; but the court expressed the opinion that this argument was not more forceful than the other, that, under a restricted right of inspection, a combination could be made by those holding a majority of the stock by which the corporation might be managed for their own interests to the exclusion and detriment of the minority holders and the injury of the public dealing with it. For other authorities holding that the fact that a shareholder owns stock in a rival concern does not bar his right of inspection, see *Cobb v. Lagarde*, 129 Ala. 488, 30 South. 326; *Weinhenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446. In *Mutter v. Eastern etc. Ry. Co.*, 38 Ch. Div. 92, it is held that the fact that a person has taken stock in a corporation at the instance of a rival concern, in order to serve the purpose of the latter, does not preclude him from exercising his statutory right to inspect the register of debenture stockholders. But in *Re Kennedy*, 75 App. Div. 188, 77 N. Y. Supp. 714, a writ of mandamus was denied to one whose real purpose in making an inspection was to obtain information to aid in crippling the business of the corporation, for the benefit of its rival.

In *Hemingway v. Hemingway*, 58 Conn. 443, 19 Atl. 766, it is held that an examination cannot rightfully be had for a purpose hostile to the corporation, and that therefore a director of a company actively engaged in organizing a rival concern has no right to examine the letter-files of the old company to obtain information for the benefit of the new one. And in *State v. Einstein*, 46 N. J. L. 479, it is declared that when there is a fair reason to believe that a person requesting an inspection of corporate books intends to make an improper use of them, and his request is denied on that ground, the court will not aid him by mandamus. In neither of these cases does the right of inspection appear to be conferred by statute. It is said in *Re Crosby*, 28 Misc. Rep. 300, 59 N. Y. Supp. 865, where the right of inspection was sought to be enforced by mandamus, that the motive with which the writ is sought, unless very reprehensible, will not be closely scrutinized.

b. **Hostility or Unfriendliness of Parties.**—The fact that a stockholder bears unfriendly relations toward the officers of the company does not justify a denial of his right to examine its books: *Cobb v. Lagarde*, 129 Ala. 488, 30 South. 326; *Elsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588. And the board of directors of a bank have no authority to pass a resolution excluding one of its members from an examination of the books of the concern, although they believe him to be hostile to its interests: *People v. Throop*, 19 Wend. 183.

c. **Inconvenience to Corporation.**—While courts seem to have jurisdiction, in enforcing the right of inspection, to prevent a stockholder from abusing his privilege, and to take precautions for pre-

venting an interruption of corporate business or serious inconvenience to the corporation (*Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *In re Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461), still the mere fact that inconvenience will result to the company from an inspection of its books is no ground for a denial of the stockholder's right. Indeed, it would not be unreasonable to require corporation to keep their books in duplicate, one set for the examination of shareholders at their pleasure: *State v. St. Louis etc. Ry. Co.*, 29 Mo. App. 301; *In re Reiss*, 30 Misc. Rep. 234, 62 N. Y. Supp. 145.

d. Existence of Controversy.—It has been affirmed by a number of authorities that there must be some defined dispute or controversy depending, with reference to which the right of inspection is sought, before such right will be enforced by the courts: *Commonwealth v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184; *Lyon v. American Screw Co.*, 16 R. I. 472, 17 Atl. 61; *Rex v. Tailors' Co.*, 2 Barn. & Adol. 115. This doctrine, however, is generally repudiated, as it should be: See *State v. Pacific Brewing etc. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. To quote from *Foster v. White*, 86 Ala. 467, 6 South. 88: "We do not assent to the narrow limits to which the jurisdiction is confined in *Rex v. Tailors' Co.*, 2 Barn. & Adol. 115; that is, that the inspection must be shown to be necessary in reference to some specific dispute or question depending, in which the parties have an interest. The purpose may be entirely prospective, and an examination would be proper and legitimate, if the object is to obtain information as to the management and condition of the affairs of the corporation, in order to enable the shareholder to determine whether any and what steps are necessary to establish or maintain his rights, or in order to enable him to discharge his corporate duties: *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274."

III. Exercise of Right of Inspection.

a. Time of Examination.—The right of a stockholder to inspect the books and papers of his corporation can be exercised only at a reasonable time (*Weinhenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446), and only for a reasonable length of time: *People v. Columbia Paper Bag Co.*, 103 App. Div. 208, 92 N. Y. Supp. 1084. Where a statute gives stockholders the absolute right to examine the books containing the names of directors, thirty days prior to an election of directors, the courts have a discretion to compel a corporation to allow such examinations at other times than that specified in the statute: *Matter of Sage*, 70 N. Y. 220; *Peole v. Eadie*, 63 Hun, 320, 18 N. Y. Supp. 53, affirmed in 133 N. Y. 573, 30 N. E. 1147. And it may be said, as a general rule, that so long as the relation of stockholder exists, the right of inspection may be exercised at any rea-

sonable time: *Cincinnati Volksblatt v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732.

b. **Extent of Examination.**—A shareholder's right of inspection should not be exercised to the extent of an unreasonable appropriation of the books of the corporation, detrimental to its interests and the interests of other shareholders: *State v. St. Louis etc. Ry. Co.*, 29 Mo. App. 301. It is held that an order granting an examination of all the books and papers covering a particular period, without limitation as to the place or duration of the investigation is too broad: *In re Coats*, 73 App. Div. 178, 76 N. Y. Supp. 730. See, too, *People v. Columbia Paper Bag Co.*, 103 App. Div. 208, 92 N. Y. Supp. 1084. But it is also said that a stockholder is legitimately entitled to know everything of which the records, books, and papers of the company will inform him: *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222. He cannot be denied access to the books because they contain, along with the information to which he is entitled, other information which he has no right to demand, where the right of inspection is given by statute. The law cannot be defeated by a failure to keep the books as prescribed: *People v. Pacific Mail Steamship Co.*, 50 Barb. 280, 34 How. Pr. 193. The right is not limited to one inspection, but may be exercised at any reasonable time, so long as the relation of stockholder exists: *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732.

c. **Books Subject to Inspection.**—If not restricted by the charter or rules and by-laws of the corporation, a stockholder has, by the common law, the right, at proper and seasonable times, to inspect all the books and records of his company: *Lewis v. Brainerd*, 53 Vt. 510; *State v. Pacific Brewing etc. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. See, also, *Elsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588; *Weißenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446. He is entitled, it is said, to know everything of which the books, records, and papers of the corporation will inform him: *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222. He may examine contracts made by the corporation (*Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222), its books of general account (*State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566), and, in case of a bank, its discount book: *Cockburn v. Union Bank*, 13 La. Ann. 289. As to his right to inspect the original papers and vouchers of the corporation, see *Elsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588; and as to his right to inspect the stock and transfer books, see *O'Hara v. National Biscuit Co.*, 69 N. J. L. 198, 54 Atl. 241; *Commonwealth v. Empire Pass. Ry. Co.*, 134 Pa. St. 237, 19 Atl. 629; *Lyon v. American Screw Co.*, 16 R. I. 472, 17 Atl. 61. Books in the hands of the receiver of a corporation are subject to inspection by stockholders: *People v. Cataract Bank*, 5 Misc. Rep.

14, 25 N. Y. Supp. 129; *Chable v. Nicaragua Canal Constr. Co.*, 59 Fed. 846.

An application for the inspection of the by-laws of a corporation rests upon a different footing from an application for the inspection of books and papers. The by-laws constitute a part of the contract between the stockholder and the corporation. It must therefore be a strong case which will interpose to prevent him from an opportunity to examine them, and thus ascertain the terms of the contract into which he has entered: *In re Coats*, 75 App. Div. 567, 78 N. Y. Supp. 429.

d. Requiring Books Brought into the State.—Under a statute empowering the court of chancery, the supreme court, or any justice thereof, upon proper cause shown, to summarily order any or all of the books of a foreign corporation to be forthwith brought into the state and kept therein for such time as may be designated in such order, the power granted can be exercised only when a condition arises wherein the judicial authority whose action is invoked can exercise control over such books for some lawful and useful purpose, and such condition constitutes proper cause for the exercise of the authority: *Fuller v. Hollander*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646; *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280.

Where a statute directs corporations to keep books of account at their principal place of business, and declares that stockholders shall have the right to inspect them, mandamus lies to compel a corporation to comply with the law. Keeping the books in another jurisdiction is not a compliance with the statute; a stockholder has the right to examine them at the principal place of business in this state: *Crown Coal etc. Co. v. Thomas*, 60 Ill. App. 234.

e. Taking Abstracts and Copies.—As an incident to the right of a stockholder to inspect the books, records, and papers of the corporation, is the right to make memoranda, abstracts, and copies of their contents. This right is as full as the right of inspection itself, and obviously essential to an advantageous exercise thereof: *Swift v. Richardson*, 7 Houst. 338, 40 Am. St. Rep. 127, 32 Atl. 143; *Martin v. W. J. Johnston Co.*, 62 Hun, 557, 17 N. Y. Supp. 133; *People v. Cataract Bank*, 5 Misc. Rep. 14, 25 N. Y. Supp. 129; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732. Where the statutes provide that the books of a corporation containing the names of shareholders shall be open to the examination of every stockholder, a stockholder has not only the right to inspect such books, but to take copies of the names and addresses of stockholders: *Cotheal v. Brouwer*, 5 N. Y. 562; *Mutter v. Eastern etc. Ry. Co.*, 38 Ch. Div. 92. The supreme court of Pennsylvania has taken a different, but to our mind an erroneous, view of this question: See *Commonwealth v. Empire Pass Ry. Co.*, 134 Pa. St. 237, 19 Atl. 629.

IV. Persons Entitled to Inspection.

a. **In General.**—A stockholder has no right of inspection after participating in a transaction which amounts to a sale of his stock: *State v. Whited*, 104 La. 125, 28 South. 922. And a stockholder, applying for a mandamus to enforce his right of inspection, has no standing after he sells his stock to prosecute an appeal from a judgment rejecting his demand: *State v. New Orleans etc. Exchange*, 112 La. 868, 36 South. 760. It has been held that a writ of mandamus to allow one to inspect the books of a corporation will be refused when the stock-book does not show him to be a shareholder, the statutes requiring every corporation to keep a stock-book containing the names of all stockholders, and declaring that no transfer of stock shall be valid until entered therein: *In re Reiss*, 30 Misc. Rep. 234, 62 N. Y. Supp. 145. In England, the fact that a person has taken his stock in a company at the instance of a rival company, in order to serve the purpose of the latter, does not debar him from invoking the aid of a court in enforcing his statutory right to inspect the register of debenture stockholders: *Mutter v. Eastern etc. Ry. Co.*, 38 Ch. Div. 92. A pledgee of stock has no right to examine the books of the corporation: *In re First Nat. Bank*, 28 Misc. Rep. 662, 59 N. Y. Supp. 1042, affirmed in 44 App. Div. 635, 60 N. Y. Supp. 1138. The executrix of a deceased shareholder has practically the same right of inspection that her decedent had while living: *State v. Citizens' Bank*, 51 La. Ann. 426, 25 South. 318. Under the statutes of Indiana, county assessors have the right to inspect the books and papers of corporations for the purpose of listing property for taxation: *State v. Real Estate etc. Assn.*, 151 Ind. 502, 51 N. E. 1061; *State v. Workingmen's Bldg. etc. Assn.*, 153 Ind. 278, 53 N. E. 168; and sheriffs have access to such books and papers for the purpose of making a levy on stock or transferring it to a purchaser at an execution sale: *State v. First Nat. Bank*, 89 Ind. 302; *Boone v. Van Gorder*, 164 Ind. 499, 74 N. E. 4, 108 Am. St. Rep. 314.

b. **Agent or Attorney of Shareholder.**—While the right of inspection is, in a sense, personal to the stockholder, still he may employ a skilled agent or attorney to make an examination for him; otherwise the right would in many instances be unavailing. The possession of the right would be futile if the possessor, through lack of knowledge necessary to its exercise, were debarred of the privilege to procure in his behalf the services of one competent to exercise it: *Foster v. White*, 86 Ala. 467, 6 South. 88; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *State v. Bienville Oil-Works Co.*, 28 La. Ann. 204; *State v. Citizens' Bank*, 51 La. Ann. 426, 25 South. 318; *Mitchell v. Rubber Reclaiming Co. (N. J. Eq.)*, 24 Atl. 407; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732. Nor can a shareholder be denied his right of inspection because accompanied by his attorney

and stenographer to assist him in making an examination: *Elsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588; *People v. Nassau Ferry Co.*, 86 Hun, 128, 33 N. Y. Supp. 244.

V. Corporations Subject to Inspection.

a. **In General.**—No distinction seems to be drawn between the various classes of corporations in regard to the right of inspection. The right applies, for instance, to a fire insurance company as well as to any other corporation: *In re Coats*, 73 App. Div. 178, 76 N. Y. Supp. 730. In case a corporation is in the hands of a receiver, a stockholder may be accorded the right to examine its books, under proper regulations as to time and circumstance, so as not to interfere with the discharge of the receiver's duties or with the other shareholders' right of examination: *Chable v. Nicaragua Canal Constr. Co.*, 59 Fed. 846. And in case a national bank is in process of liquidation, upon the expiration of its charter, its officers may be required to produce its books and papers for the examination of shareholders: *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761.

b. **Banking Corporations.**—The right of stockholders to inspect the books and records of their corporation accrues to stockholders in a banking corporation: *Hatch v. City Bank*, 1 Rob. (La.) 470; *State v. Citizens' Bank*, 51 La. Ann. 426, 25 South. 318. The principle upon which a stockholder is allowed access to the books of a corporation is as applicable to the case of a banking corporation as it is to any other kind of corporation. It is his common-law right, and, unless restricted by law or by charter, the exercise thereof will not be denied, at a proper time and place, when the circumstances are such as seem to the court to make the right available and its exercise proper. This doctrine applies to national banks, and is not abridged by the statutes of the United States which provide that national banks shall be subject to examination by officers appointed for that purpose, and that they shall not be subject to any visitorial powers other than such as are authorized by Congress or are vested in courts of justice: See the principal case, ante, p. 664; *Winter v. Baldwin*, 89 Ala. 483, 7 South. 734; *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761.

c. **Foreign Corporations.**—The courts of New York have taken the view that the common-law right of a stockholder to inspect the books of his company does not exist as against a foreign corporation doing business in the state, whether the stockholder is a resident or non-resident of the commonwealth: *In re Rappleye*, 43 App. Div. 84, 59 N. Y. Supp. 338; *In re Crosby*, 43 App. Div. 618, 59 N. Y. Supp. 340; *People v. Knickerbocker Trust Co.*, 38 Misc. Rep. 446, 77 N. Y. Supp. 1000. But in Delaware mandamus will issue to permit a nonresident stockholder to inspect the books of a foreign corporation, if they are in the state and in the custody of the person to whom the writ is directed: *Swift v. Richardson*, 7 Houst. 338, 40 Am. St. Rep. 127, 32

Atl. 143. And in Louisiana it is held that if a foreign corporation doing business within the state fails to keep therein its books as required by law, and its officer having the custody of such books is not within the reach of state process, mandamus will not lie to compel the inspection of the books; but if there are other books within the state and in the custody of the agent of the corporation therein, mandamus may issue in favor of a resident or a nonresident stockholder to compel permission to inspect such books. This right of the stockholder, moreover, is not affected by a provision in the charter or by-laws that differences between the corporation and its stockholders shall be submitted to arbitration: *State v. North American Land etc. Co.*, 106 La. 621, 87 Am. St. Rep. 309, 31 South. 172.

VI. Remedies for Enforcement of Right.

a. **Demand and Refusal.**—Generally speaking, a stockholder cannot enlist the aid of the courts to enforce his right to inspect the books of the corporation, unless he has first made a demand for an opportunity of inspection and has met with a denial of or obstruction to his right: *Mathews v. McClaughry*, 83 Ill. App. 224; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 573; *People v. Walker*, 9 Mich. 328. The demand may be made by his authorized attorney: *Mitchell v. Rubber Reclaiming Co. (N. J. Eq.)*, 24 Atl. 407. It seems that an informal request will not put the corporation in default: *Legendre v. New Orleans Brewing Assn.*, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 South. 837. But under a statute authorizing a stockholder to examine certain books and papers of his company, neither an officer of the corporation nor a court on mandamus proceedings is warranted in refusing him the right to see any of the books or papers, merely because he has asked to inspect more than he is entitled to see: *Elsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588. And when a stockholder has made repeated demands for an examination of the stock-book of a foreign corporation, a denial of his right is established where those in charge of the office have met his demands with evasive answers for a month: *People v. Montreal etc. Copper Co.*, 40 Misc. Rep. 282, 81 N. Y. Supp. 974. An indefinite delay in according the right of inspection is equivalent to a denial of it: *Cobb v. Lagarde*, 129 Ala. 488, 30 South. 326. When a demand has been deposited in the postoffice, it will be presumed to have reached its destination: *Neubert v. Armstrong Water Co.*, 211 Pa. St. 582, 61 Atl. 123.

b. **Recovery of Damages.**—The right of a stockholder to examine the corporate books is a right which gives him a cause of action for damages against the officers of the corporation if they refuse to allow him to make an examination: *Bourdette v. Seward*, 52 La. Ann. 1333, 27 South. 724; *Lewis v. Brainerd*, 53 Vt. 510. However, if there has been no bad faith on the part of the officers, the damages claimed must be those of which the refusal is the legal proximate cause, and

of these due proof must be made. Remote, uncertain, collateral, and speculative damages cannot be recovered: *Bourdette v. Sieward*, 107 La. 258, 31 South. 630. An error of an officer in a subordinate position in refusing a stockholder to inspect the company's books does not of itself expose the corporation to liability for damages. To fix its responsibility, it must appear that the officer acted under authority, or that his act has been ratified: *Legendre v. New Orleans Brewing Co.*, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 South. 837.

c. Mandamus Proceedings.

1. **In General.**—An action for damages, however, is an inadequate remedy where a stockholder meets with a denial of his right of inspection, and therefore mandamus against the custodian of the books sought to be inspected is regarded as an appropriate and proper remedy: *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050; *Swift v. Richardson*, 7 Houst. 338, 40 Am. St. Rep. 127, 32 Atl. 143; *Crown Coal etc. Co. v. Thomas*, 60 Ill. App. 234; *State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556, 22 South. 815; *Weinhenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446; *Neubert v. Armstrong Water Co.*, 211 Pa. St. 582, 61 Atl. 123. Indeed, in some jurisdictions, mandamus is said to be the sole remedy for a stockholder wrongfully refused an inspection of the books and papers of his corporation: *Fuller v. Hollander*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646.

2. **Discretion of Court.**—The allowance of the writ of mandamus, under the common law, to enforce the right of inspection, is discretionary with the court; upon the facts presented in each particular case. The power of the court will not be exercised as a matter of course: *Legendre v. New Orleans Brewing Assn.*, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 South. 873; *Bruning v. Hoboken Print. etc. Co.*, 67 N. J. L. 119, 50 Atl. 906; *In re Pierson*, 28 Misc. Rep. 726, 59 N. Y. Supp. 1003; 44 App. Div. 215, 60 N. Y. Supp. 671; *People v. Produce Exch. Trust Co.*, 53 App. Div. 93, 65 N. Y. Supp. 926; *Lyon v. American Screw Co.*, 16 B. L. 472, 17 Atl. 61; *Guthrie v. Harkness*, 199 U. S. 148, ante, p. 667, 26 Sup. Ct. Rep. 4. To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the court; but the writ should issue as a matter of course, although probably even then due precaution may be taken as to time and place, so as to prevent interruption of business or other serious inconvenience to the corporation: See *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *Elsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. Y. 588; *In re Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; *People v. Keeseville etc. R. R. Co.*, 106 App. Div. 349, 94 N. Y. Supp. 555.

3. **Parties Defendant.**—The writ of mandamus, it would seem, is properly directed to the officer of the corporation having the cus-

tody and control of the books sought to be examined. But joining an unnecessary party does not vitiate the proceedings: *Swift v. Richardson*, 7 Houst. 338, 40 Am. St. Rep. 127, 32 Atl. 143; *Bay State Gas Co. v. State*, 4 Penne. (Del.) 238, 56 Atl. 1114; *People v. Throop*, 12 Wend. 123; *State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566. It is not entirely clear whether the corporation itself should be made a party: See the authorities just cited, and in addition thereto the case of *State v. North American Land etc. Co.*, 105 La. Ann. 379, 29 South. 910.

d. Equitable Remedies.

1. **In General.**—In some jurisdictions the refusal of permission to a stockholder to examine the books of his company is not, of itself, a ground for equitable interference, the remedy at law by mandamus being regarded as adequate: *Stettaner v. New York etc. Const. Co.*, 42 N. J. Eq. 46, 6 Atl. 303; *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912. The inherent jurisdiction of a court of chancery, it is affirmed in *Fuller v. Hollahder*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646, to compel the production for inspection of books and papers, whether of an individual or of a corporation, is confined to cases where they are evidential in a cause pending in court, and cases arising under a bill filed for relief as well as discovery, or for discovery only, in aid of a prosecution or defense in litigation pending or contemplated. “As a matter of practice,” said Justice Simonton in *Ranger v. Champion Cotton-Press Co.*, 51 Fed. 61, “I am inclined to the opinion that the court, within its discretion, can order corporate authorities to permit a shareholder an inspection of the books of the corporation at any stage of the suit. But it will not make such an order upon the filing of the bill, or before the parties have appeared and pleaded, except under the most pressing necessity.”

2. **Injunction and Receivership.**—In some jurisdictions, the proper remedy to enforce the statutory right of a stockholder in a corporation to inspect its books and records is by injunction: *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732. Consult, also, *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563. In England, this statutory right can be enforced by an injunction restraining interference by the corporation with the shareholder in the exercise of his right, without his being compelled to apply for a writ of mandamus calling upon the officers for an examination: *Holland v. Dickson*, 37 Ch. D. 669.

The denial of a stockholder's right to inspect the books and papers of his company is not a sufficient reason for the appointment of a receiver for the corporation: *Original Vienna Bakery Co. v. Heisler*, 50 Ill. App. 406.

TILTON v. STERLING COAL AND COKE COMPANY.

[28 Utah, 173, 77 Pac. 758.]

OPTION.—A Conditional Acceptance of an Option to purchase amounts to a practical objection of it. (p. 693.)

OPTION—Consideration—Acceptance and Withdrawal.—Where an option is given a lessee to purchase the premises, the lease is a sufficient consideration to support the option, and the lessor cannot withdraw it before the time given in which to accept it has expired; but when the time for acceptance is specified, the option, if not accepted at that time, terminates if no further time is granted. (p. 694.)

OPTION—Nature of Option to Purchase.—While an option to purchase, if based on a consideration, binds the person granting it, it is not a contract of purchase until acceptance, but it is simply a contract granting a privilege to purchase and binding the grantor to convey the property only when the terms are accepted and complied with. (p. 694.)

TIME—First and Last Days.—In the computation of time fractions of a day are not reckoned; and when an act is required by a contract to be done within a specified period from or after a particular day, the general rule is to exclude the day thus designated and to include the last day of the specified period. (p. 695.)

TIME—Fractions of Day.—Since the Law Rejects fractions of a day, when an act is required by a contract to be performed on a specified day its performance is not referable to any particular portion of that day, but may be performed at any period within its compass. (p. 696.)

TIME.—If a Lease, which Grants an Option to purchase on its expiration, expires on the first day of the month, the lessee has the right to accept the option at any time during that day, but not on any day thereafter. (p. 697.)

Charles C. Dey & C. W. Stevens, for the appellant.

S. R. Thurman and Hurd & Wedgwood, for the respondent.

¹⁷⁴ **BASKIN, C. J.** This is an action for the specific performance of a contract, and for the recovery of damages for an alleged breach of the same by the appellant.

¹⁷⁵ The contract contained the following stipulations, viz.:

“In consideration of the sum of one hundred and seventy-five dollars (\$175.00) per annum, payable annually in advance on the first day of October of each year, the party of the first part [appellant] hereby agrees to lease to the said party of the second part [respondent] for a term of five (5) years from the first day of October, 1898, the water flowing from the tunnel of said company at its coal mine

at Morrison, Sanpete county, Utah, and to grant to said party of the second part a right of way over its land, for a ditch of sufficient capacity to carry the water from said tunnel, subject to said first party's approval of the location of said ditch.

"The said party of the first part further agrees to give to said party of the second part an option to purchase, at the expiration of this lease, the above-described water for the sum of three thousand dollars (\$3,000).

"The said party of the second part agrees to make the payments as above stated, and to be responsible for any damages that may accrue from an overflow or breaking of said ditch, or otherwise, and to keep said ditch in good repair."

At the trial it was decreed "(1) that the contract made and entered into by and between the plaintiff and the defendant on the seventeenth day of November, 1898, be specifically performed as hereinafter set forth; (2) that plaintiff have and recover from defendant the sum of eight hundred dollars damages, and his costs in this action, taxed at ——— dollars; (3) that plaintiff have credit upon the purchase price of the water mentioned in said contract, to wit, upon the said sum of three thousand dollars, for the said sum of eight hundred dollars damages, and the further sum of one thousand dollars, the pro rata value of the two second feet of said water heretofore decreed by this court to be owned by corporations not parties to this action, and ¹⁷⁶ which the defendant is therefore unable to convey to the plaintiff in pursuance of said agreement; (4) that within five days after the signing of this decree the said plaintiff shall pay to the clerk of this court for the use of defendant the sum of twelve hundred dollars, and, within five days after service upon it of a copy of this decree, said defendant shall execute and deliver to the clerk of this court, for the plaintiff, a deed in writing conveying to said plaintiff the water flowing from said tunnel, save and excepting said two second feet thereof." It was further decreed that the appellant, its successors and assigns, and all persons claiming under it since November 17, 1898, the date of the lease, be enjoined from asserting title to the water mentioned in the decree, and from interfering with the respondent in the free use thereof.

It is contended on the part of the appellant that, by the second paragraph of the stipulations, an option, only, to purchase the water at the expiration of the lease, was granted to the respondent. On the other hand, it is contended on behalf of the respondent that, taking the stipulations all together, they constitute a contract of absolute purchase of the water at the expiration of the lease, and that upon the tender by the respondent of the purchase price he became entitled to a specific performance of the contract. The language of that paragraph is peculiar. By the literal terms of the contract, no option to purchase was given to the respondent. The appellant only agreed to give to the respondent an option to purchase at the termination of the lease. This the appellant failed to do. Whether for that breach the respondent, under a literal interpretation, could maintain an action either for damages or specific performance, is a question which we are relieved from deciding, because it appears from the letters of the parties hereinafter set out that they considered and treated the contract as granting an option to purchase at the expiration of the lease. This being so, we are of the opinion that the construction given to the ¹⁷⁷ contract by the parties should prevail, and that we should give to it the force which the letters of the parties show they intended.

Considering then, as we do, the contract as one which granted an option to purchase, and not, as claimed by respondent, a contract of absolute purchase, we come to the consideration of appellant's contention that the facts shown by the evidence are not sufficient to sustain the decree for specific performance.

It is contended by appellant's counsel that the respondent did not, as found by the trial court, accept the option prior to the expiration of the lease. On the subject of this finding, the following letters of the president of the appellant and of the respondent were introduced, to wit:

“Salt Lake City, Utah, August 2, 1901.

“F. T. Tilton, Esq., Richfield.

“Dear Sir: I see the judge has given two second feet of our water to the Gunnison water thieves, and I do not feel like going to the expense of an appeal or a new trial. I think it is now time for you to decide whether you will

take that water or not. I feel like punishing those men all I can at any rate, and if you will throw up your contract, I think I can do it so they will lose more in the end than they have gained. If you are in the city soon, call and see me, or write and let me know fully in reference to this matter at once.

“Yours truly,

“THEODORE BRUBACK,

“President.”

“Richfield, Utah, August 5, 1901.

“Theodore Bruback, President Sterling Coal & Coke Company, Salt Lake City, Utah.

“Dear Sir: Replying to your letter of the 2nd inst. in the matter of the suit with the Gunnison Irrigation Company, will say that we can, under no consideration, surrender our contract for the purchase of the water from your company. If your company will ¹⁷⁸ pay up the costs of this lawsuit and make the proper allowance to us on our contract of purchase for the loss of this two second feet which the court has decided did not belong to your company, and thereby place us in the same position that we were before the suit was instituted, we will take up, at any time, our option to purchase, providing your company can furnish a good title to the same.

“Yours truly,

“TILTON & WEYMOUTH,

“Per F. T. TILTON.”

“Salt Lake City, Utah, February 26, 1902.

“F. T. Tilton, Esq., Axtell, Utah.

“Dear Sir: I regret to be compelled to state that owing to the inability of the Sterling Coal & Coke Company to pay the interest on their bonded indebtedness, they have been notified that foreclosure proceedings will be instituted and their property sold for the interest and principal of their bonded indebtedness, amounting now to considerable over \$100,000.00. This company, therefore, desires to notify you that after this season they will be unable to furnish you with the water now leased by you, and, of course, as a consequence, the option heretofore given, as it will then become the property of the bondholders. You

will, therefore, be compelled to make some other arrangement for water than the one you now have.

"Yours very truly,

"THEODORE BRUBACK,

"President."

"Provo, Utah, March 12, 1902.

"Mr. Theodore Bruback, Salt Lake City.

"Dear Sir: Yours of the 2-26 inst. at hand. In answer will say if I don't have the use of the mine water mentioned, I will thoroughly understand the reason why.

"Yours very truly,

"F. T. TILTON."

No other evidence on the subject was offered.

These letters, taken together, show that, in contemplation¹⁷⁹ of law, the option granted in the lease was not accepted by the respondent, because he required, as a condition of acceptance, the appellant to do more than called for by the stipulations of the lease. A conditional acceptance of an option amounts to a practical rejection of it. In 1 Parsons on Contracts, eighth edition, page 477, the rule is thus stated: "The respondent is at liberty to accept wholly or to reject wholly; but one of these things he must do, for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer": 1 Warvelle on Vendors, 2d ed., sec. 127; 21 Am. & Eng. Ency. of Law, 2d ed., 930; Gigger v. Nesbitt, 122 Mo. 675, 43 Am. St. Rep. 596, 27 S. W. 385; Minneapolis etc. Ry. Co. v. Columbus R. Mill Co., 119 U. S. 149, 7 Sup. Ct. Rep. 168, 30 L. ed. 376, and cases there cited.

2. The lease terminated on the 1st of October, 1903, and on the 9th of that month respondent tendered for the first time to the appellant three thousand dollars—the price of the water mentioned in the stipulations of the lease giving the option. It does not appear that the respondent, either on the day on which the lease expired or afterward, until the tender of the three thousand dollars, made any formal acceptance of the option, or did any act from which the appellant could infer that it was his intention to accept the option, and on his part perform its conditions. Appellant's counsel contend, in substance, that it was not bound either by the tender made, or the acceptance of the

option implied from the tender, as both occurred several days after the expiration of the lease.

When an option is given to a lessee to purchase the leased premises, the lease is a sufficient consideration to support the option, and the lessor cannot withdraw it before the time given in which to accept it has expired; but when the time for its acceptance, as in the case at bar, is specified, the option, as a general rule, unless it is accepted at that time, terminates, if no further time be granted. While an option to purchase, if based upon a sufficient consideration, ¹⁸⁰ binds the party granting it, it is not a contract of purchase, but simply a contract granting to the holder of the option the privilege of purchasing, and binds the party by whom it is given to sell and convey the property involved, upon the acceptance of the option in accordance with the terms, and the compliance on the part of the acceptor with its requirements. There is no contract of purchase, or any obligation to sell and convey, until the option is accepted and performed, or tender of performance by the holder is made in proper time. Until then there is no contract between the parties which can be specifically enforced.

Respondent's counsel contend that he was not required to accept the option or tender performance on his part at the termination of the lease, but had the right to do so within a reasonable time thereafter, because, as the lease terminated the last moment of the first day of October, the option contract "must be construed either to require the election and payment to be made at the very moment of its expiration, or else it must be construed to give the respondent a reasonable time thereafter to make his election and payment, and demand a conveyance of the water, and that the parties must either be presumed to have intended that the matter should have been closed at midnight, October 1st, and the contract to have fixed that time, or else it must be said that they fixed no precise time whatever; and in that case, unquestionably, the law is that a reasonable time thereafter was intended by the parties, and that the contract should be so construed." In support of that view, our special attention has been directed to the case of *Rogers v. Burr*, 97 Ga. 10, 25 S. E. 339. In that case the contract contained a provision giving to the subscriber of stock the right, at the expiration

of three years from a time stated, to elect whether he would keep the stock, or turn it over to the plaintiffs, and require them to pay him therefor its par value. It was held that the subscriber had no right to make this election before the expiration of the time, and that, as the time for such ¹⁸¹ election expired at midnight on November 30th, a reasonable time thereafter in which to make the election was allowable. For the reasons hereinafter stated, we do not think that that decision is correct. A similar provision in a contract was construed in the case of *Magoffin v. Holt*, 62 Ky. 95, and in the opinion it is said that "at the expiration of three years means, and was intended to mean, the day on which the period of three years expired. The meaning is as clear, we think, as it would be in the case of an ordinary promissory note for the payment of a sum of money at the expiration of three years from date." A note payable one year from date becomes due in the following year on the same day of the month on which it was dated, and, if it is entitled to days of grace, these should be added to the time which the note has to run. A note dated on the 10th of February, payable two months thereafter, becomes due on the 10th of April, or on the 13th, if it is entitled to days of grace: 2 *Edwards on Bills and Notes*, sec. 707. It is a general rule of law that, in the computation of time, fractions of days are not reckoned; and when an act is required, by a contract, to be done within a specified period from or after a particular day, the general rule is to exclude the day thus designated, and to include the last day of the specified period: 1 *Beach on Contracts*, secs. 630, 631. In the case of *Wiggin v. Peters*, 1 Met. (Mass.) 127, it is held that the effect of the expressions "at the expiration of ninety days" and "within ninety days" is the same. In that case one of the conditions of a bond for prison limits given on behalf of a debtor was that he, at the expiration of ninety days from the date of his commitment, should surrender himself, etc. He was committed on the 1st of April, and surrendered himself on the 1st of July. In the opinion, written by Mr. Chief Justice Shaw, it is said: "The words in the bond are 'at the expiration of ninety days from the day of his commitment.' The words in the statute are a little different—'if he shall not be discharged within ninety ¹⁸² days from the day of his commitment, he will surrender,' etc.

But the effect is the same. 'Ninety days' is a term of time excluding the day of the commitment, and the bond is not forfeited if he obtains his discharge at any time within that term. The case of his not obtaining his discharge cannot happen until the whole of that time has expired, and therefore there can be no breach of this condition till the whole of that time has expired. In the case before us, excluding 'the day of the commitment,' the term of ninety days expired on the last moment of the last day of June; and as, in general, the law does not recognize any division of time less than a day, a surrender on the 1st of July was a surrender at the expiration of the last day of June, and there was a surrender within the time limited by law, and by the condition of the bond, and saved the forfeiture." Under section 2520 of the Political Code of California, the governor was authorized to appoint three harbor commissioners, and at the expiration of their term to appoint their successors. On the last day of the term of one of the commissioners appointed by him, he appointed his successor. It was contended (*People v. Blanding*, 63 Cal. 333) that this appointment was invalid, because the governor was not authorized to make it on the day the incumbent's term expired, but the objection was not sustained; the court holding that the word "at," as used in section 2520 of the Political Code, is indefinite in its meaning, and may mean the exact moment of time, or near it. As the law rejects fractions of a day, when an act is required by a contract to be performed on a specified day, its performance is not referable to any particular portion of that day, but may be performed at any period within its compass. In the case at bar the lease expired on the first day of October, and before the beginning of the following day; and as the law does not, in general, recognize any division of time less than a day, we think that the proper construction of the lease is that the respondent was thereby granted the right to accept the ¹⁸³ option at any time during the day on which the lease terminated, but had no right to do so on any day thereafter.

It is also contended by the respondent that he had the right, without making a tender of the three thousand dollars, to bring his action for specific performance within a reasonable time after the termination of the lease, because the appellant by its letter of February 26, 1902, before

quoted, notified the respondent that it would not perform the conditions, on its part, of the option, and that said notice was not subsequently withdrawn. In support of this contention numerous cases are cited which hold that when one of the parties to a contract refuses to perform, or notifies the other party of his determination not to perform, his part of its obligations, a demand for performance, or a tender or offer to perform by the other party, unless the previous notice has been withdrawn, is unnecessary, and not required before commencing suit. This principle is not applicable to the case at bar, because, as before stated, until the acceptance of an option in accordance with its terms, no contract of purchase exists, and the party giving the option is under no obligation to convey the property mentioned therein.

It appears from the record that the irrigation companies of the towns of Gunnison and Sterling, in an action against the appellant, were decreed to be the owners and entitled to the use of the two second feet of water leased to the respondent, and that after the rendition of said decree the respondent was deprived of two second feet of water leased to him. For this loss he was awarded eight hundred dollars as damages. It is ordered that that portion of the decree awarding damages be affirmed, and that portion requiring a conveyance of the water, and enjoining the appellant, its successors and assigns, and all persons claiming under it, be, and is hereby, reversed and held for naught, and that each party pay their own costs of this appeal.

Bartch and McCarty, JJ., concur.

A Conditional Acceptance of an offer to sell land amounts to a rejection of the offer: Egger v. Nesbitt, 122 Mo. 667, 43 Am. St. Rep. 596; Kennedy v. Grambling, 33 S. C. 367, 26 Am. St. Rep. 676.

An Option to Purchase Land given without consideration may be withdrawn at any time before acceptance, but an option founded on a valuable consideration cannot be withdrawn before the expiration of the time therein specified: Cummins v. Beavers, 103 Va. 230, 106 Am. St. Rep. 881; Tibbs v. Zircle, 55 W. Va. 49, 104 Am. St. Rep. 977; Mueller v. Nortmann, 116 Wis. 468, 96 Am. St. Rep. 997, and see the cases cited in the cross-reference note thereto.

The Computation of Time is the subject of a monographic note to State v. Michel, 78 Am. St. Rep. 372-376. For subsequent authorities on disregarding fractions of a day, see Ex parte Massie, 131 Ala. 62, 90 Am. St. Rep. 20; and for subsequent decisions on excluding first or last days, see Aultman v. Syme, 163 N. Y. 54, 79 Am. St. Rep. 565; Elder v. Horseshoe Min. etc. Co., 15 S. Dak. 124, 102 Am. St. Rep. 681; Maynes v. Gray, 69 Kan. 49, 105 Am. St. Rep. 146.

HEARST v. PUTNAM MINING COMPANY.

[28 Utah, 184, 77 Pac. 753.]

CORPORATIONS—Right to Dispose of Property.—A corporation has the same dominion over its corporate property, with the same right of disposition, as a private person has over his. (p. 703.)

CORPORATIONS—Stockholder's Suit.—A stockholder cannot recover corporate property, fraudulently disposed of by the officers of the corporation, by suing in his own right and for his own benefit. (pp. 705, 708.)

CORPORATIONS—Stockholders' Suits—Res Judicata.—Where a suit was brought by stockholders in the right of the corporation to cancel a conveyance of corporate property on the ground of fraud, a judgment therein that there was no fraud is conclusive upon other stockholders in a subsequent action for the same purpose and upon a like state of facts. (p. 709.)

Marshall & Royle and C. C. Dey, for the appellants.

Pierce, Critchlow & Barrette, H. P. Henderson, Ogden Hiles, Arthur Brown and Andrew Howat, for the respondent.

¹⁸⁵ BARTCH, J. This is an action in equity resulting from certain mining transactions, whereby the plaintiffs claim they were defrauded.

From the pleadings and the record, it appears, in substance, that the defendant Putnam Mining Company was a corporation organized under the laws of Utah, with a capital stock of one hundred thousand shares, of the par value of \$10 each. When the transactions, of which complaint is made, occurred, each of the plaintiffs was the owner of three thousand two hundred and ninety-three shares of that stock. The company owned twelve mining claims, with all their "appurtenances, buildings, tunnels, shafts, tools thereon and therein," situate in Summit county, Utah. The defendant William M. Ferry was the vice-president and a director of the company, and on about October 16, 1895, the company gave him a lease and bond on said mining property, whereby it was, in substance, agreed that Ferry should, at his own expense, operate and develop ¹⁸⁶ the premises for a period of two years from the date of the lease, and should yield and pay to the lessor twenty per cent in value of all pay ores which he would mine and extract under the lease; that the lessee should have the disposal of certain "treasury stock" of the company, to aid him in defraying the expense of developing the mine under his lease; that he should have an option, at any time before

the expiration of the lease, to purchase the said premises and property for the sum of \$300,000, the money to be paid to the lessor; and that the lessee would not assign the lease, or any interest therein, without the consent of the lessor. Thereafter the lease and bond were extended to October 16, 1898, and on May 20, 1898, they were extended to October 16, 1900.

On August 15, 1899, the lessee, having then become financially unable to proceed with the work of developing the property, assigned an undivided two-thirds interest in his lease and bond to Francis Smith and David C. McLaughlin, both of them since deceased, on condition that the Putnam company would consent to such assignment. The assignees, by the assignment, agreed to prosecute the development work on the property, agreeably to the lease, at their own expense, upon the condition that the assignor would procure a reduction, in the purchase price of the property under the option, from \$300,000 to \$50,000. On September 18, 1899, the regular annual meeting of the stockholders of the Putnam company was held for the election of officers, and such other business pertaining to the business and property of the company as might properly come before it. At that meeting the stockholders present, representing sixty-six thousand four hundred and eleven shares of the ninety-nine thousand three hundred and sixty shares of the capital stock then issued and outstanding, did, by unanimous vote, adopt and pass a resolution authorizing and instructing the board of directors of the company, by its president and secretary, to execute and deliver to Ferry an instrument in writing changing and modifying the lease and bond in the particulars following: ¹⁸⁷ 1. Extending the time of said lease and bond or option to purchase from October 16, 1900, to October 16, 1903; 2. Reducing the amount to be paid for said property, under said option to purchase, from \$300,000 to \$50,000; 3. Permitting Ferry to make such disposition of the lease and bond, by subletting or otherwise, as, in his discretion, he might deem to be for the best advantage in developing the mining claims.

And thereafter the president and secretary of the Putnam company executed and delivered to Ferry, under the seal of the corporation, the instrument thus required by the resolution, modifying the lease and bond in the particulars mentioned. The assignees then proceeded, under the lease and bond, to prosecute the work of mining and developing the claims. They sunk a shaft to the depth of four hundred feet,

and did other mining work at a cost to them of over \$33,000; and afterward the lessees, and others associated with them, organized, under the laws of Utah, the defendant Quincy Mining Company, with a capital of \$75,000, and Ferry and his associates assigned the lease and bond to the latter company for shares of its capital stock. On December 6, 1901, the Quincy company elected to exercise the option, under the lease and bond, to purchase the mining claims and property for \$50,000, and thereupon paid that sum to the Putnam company, and received from it a deed to the property, as provided in the lease and bond and the modifications thereof. A part of the sum thus paid to the Putnam Mining Company was used by that company to pay its debts, and out of the entire residue a dividend of forty-eight and one-half cents per share was declared on its capital stock, which was paid to its stockholders; and the plaintiffs received and accepted the dividends on their shares of stock, the same as did the other stockholders of the company.

The plaintiffs allege in their complaint that all these various transactions by which the property of the ¹⁸⁸ Putnam company was leased, and afterward sold to the Quincy company, were fraudulent; that Ferry, being the vice-president and a director of the company, was seeking his own profit and advantage, to the disadvantage of the corporation, and to the sequestration and dissipation of its property; that the board of directors were in collusion with him and under his control; that the majority of the stockholders were in collusion with him to defraud the minority; that there was no necessity for leasing the property in order to develop it; that it could have been prospected and developed better by the corporation itself; that Ferry had special knowledge of the richness of the ore bodies which were beneath the surface of the claims; that he and his associates, and those in collusion with him, knew of the great value of the property; that the transactions were had and done with the intent to get for themselves property of the Putnam Mining Company which was worth millions of dollars for the grossly inadequate sum of \$50,000, to the injury of the Putnam Mining Company, and in fraud of the minority stockholders; that plaintiffs did not know of the fraud which had been committed till after it had been done, and until after they had accepted the said dividend out of the \$50,000 purchase money; that the directors of the Putnam Mining Company being in collusion with Ferry and his asso-

ciates and with the Quincy Mining Company, to ask them to proceed to have these fraudulent things undone would be to ask a vain thing; that since the sale by the Putnam company to the Quincy company of the property in question, the latter company has sold and conveyed it to the Daly-West Mining Company for thirty thousand shares of its capital stock; that before the sale to the Daly-West company the Quincy company distributed to its stockholders \$1,200,000 in dividends derived from working said mining claims; that the Quincy company has on hand in its treasury about \$200,000 derived in the same way; that the plaintiffs are entitled to and should receive .06586 of all of such ¹⁸⁹ money and stocks, as their share of the proceeds which resulted from these alleged fraudulent transactions.

The demands of the plaintiffs are that the lease and bond, and the several instruments of conveyance resulting from the lease and bond, be declared null and void; that an account be taken of all the money and stocks received by the Quincy Mining Company, or due to it, to ascertain the just proportion which should be paid by the defendants to plaintiffs; and that, upon such accounting, judgment be entered in favor of the plaintiffs for the amount due them.

The answer denies the material allegations of the complaint; pleads affirmative matter showing the nature of the transactions of which the plaintiffs complain; and as a separate affirmative defense, and as a bar to this action, it is averred that heretofore Margaretta V. Rogers, one of the shareholders of the Putnam Mining Company, prosecuted, in the right and for the benefit of the corporation, a suit in the district court for Summit county, to set aside and annul the said sale and transfer of the same property of the Putnam company, for the same alleged grounds and the identical dealings and transactions which are alleged and set forth in the complaint herein; that in said action the Putnam Mining Company and the Quincy Mining Company were made parties defendant with Ferry, and as such appeared in that action; that upon trial thereof in the district court it was adjudged that neither Mrs. Rogers nor the Putnam Mining Company was entitled to an accounting, nor to any relief on account of the alleged dealings, because the same were in all respects fair and just; that findings and judgment were entered accordingly; and that the same is now a valid and subsisting judgment.

To this special and separate defense the plaintiffs demurred upon the ground that it did not state facts sufficient to constitute a defense, and also moved to strike out certain portions of the answer. On October 5, 1903, the demurrer was overruled, the motion to ¹⁹⁰ strike out denied, and the further hearing continued to October 10, 1903, on which date, as appears from the findings of fact, this "cause came on regularly for trial" before the court sitting without a jury, and that the "plaintiffs declined to offer any testimony whatever in support of their complaint in this cause," but stated in open court that they would stand upon their complaint, and their exceptions to the rulings of the court, as to their demurrer and motion, and thereupon rested. The defendants, then, "to sustain the issues on their part," introduced in evidence the judgment-roll in the case of *Rogers v. Ferry et al.*, above referred to as pleaded in the answer, and also the deposition of William M. Ferry, and rested. The plaintiffs introduced no evidence in rebuttal, and thereupon, after submission of the cause for decision, the court found the issues in favor of the defendants upon the merits, and rendered judgment of dismissal of the complaint and for costs. The plaintiffs appeal.

The decisive question presented in this case is whether the court erred in overruling the demurrer to the special and separate defense set up in the answer, and in denying the motion to strike out that portion of the answer.

The appellants contend that the judgment in the case of *Rogers v. Ferry et al.*, wherein the Putnam Mining Company was made a defendant, constitutes no bar to this suit, and that their demurrer should have been sustained and their motion granted.

The respondents insist that not only this action is barred by the judgment in the *Rogers* case, but also that these plaintiffs must fail because they have brought and are attempting to maintain this suit in their own right, and not in the right of the Putnam Mining Company, although they claim only as stockholders of the corporation.

The position of the respondents seems to be sound. And first as to the suit having been brought ¹⁹¹ for the benefit of the plaintiffs, in their own right, and not that of the Putnam Mining Company: In their complaint the plaintiffs allege the corporate existence of the Putnam Mining Company; that they are stockholders of the corporation; that the corpora-

tion owned and operated certain mining property; that through certain fraudulent dealing and transactions, the directors and agents of the company conveyed all its property to Ferry and his associates; and that although the property has since been very productive, and has paid large sums in dividends, no accounting has been made to the plaintiffs, nor to the Putnam Mining Company. They then demand that the alleged fraudulent dealings and transactions be set aside, and the instruments of conveyance decreed null and void; that an accounting be had of all moneys and stocks received by or due the vendee; that the just proportion to be paid the plaintiffs be ascertained; and that judgment be entered in their favor for the amount found due them. They then ask "for such further or all other relief as plaintiffs may be entitled to in equity and good conscience." They thus sue in their own right and for their own benefit only, notwithstanding the general allegation that the suit is also for the benefit of others who are in like situation, and who may appear as parties. They appear to proceed upon the theory that, because of the alleged fraudulent transactions, they are cestuis que trustent of a constructive trust, or a trust created in their favor, *ex maleficio*, by wrongful acts of the defendants, in dealing with the property and assets of the Putnam Mining Company. Under the facts disclosed by this complaint, no suit can be maintained upon such a theory. As has been seen, the allegations of the complaint clearly show that all the property in controversy was owned by and belonged to the corporation, and not to the plaintiffs, and it is not disputed that the corporation could own and hold its corporate property in absolute right, same as an individual. Nor can it be, for a corporation in a distinct entity, an artificial person, ¹⁹² created by law, and, as such, in this state, is capable of suing and being sued, of acquiring, owning, and disposing of property, within the objects of its creation, the same as a natural person; and one may deal with it, respecting its property, the same as with an individual owner, and without any greater danger of being held to have received property into his possession burdened with a direct trust or lien. Being a creature of statute, and having conferred upon it its individuality by law, which has endowed it with a legal existence, independent of any or all of its stockholders, the corporation has the same dominion over its corporate property, with the same right of disposition, as a private person has over his.

In *Weyeth H. & M. Co. v. James-Spencer-Batenian Co.*, 15 Utah, 110, 121, 122, 47 Pac. 604, it was said: "The natural person has such powers and rights as are conferred upon him by nature, except as restricted by human laws for the good of society. The artificial person or corporation has such powers and rights as are conferred upon it by the law of its creation, and such as are incidental and necessary to its corporate existence. Both the natural and artificial personages act in an individual capacity. Among the most important attributes of a natural person are his absolute dominion over his property and his right of disposition, and the same may be said of a corporation aggregate as to its corporate property. It has the right to contract and be contracted with, to sue and be sued, to implead and be impleaded, the same as a natural person; and it has the right to do all other acts in regard to its property that a natural person may do in regard to his."

Since, then, the corporation was capable of owning, and in fact did own, the property in controversy, absolutely, as a distinct entity, how could that property be held to be property in trust for the benefit of persons who are admittedly not the owners thereof, and who have, at most, but an interest in the fund created by the operation or disposition of the property? ¹⁹³ The very fact that the plaintiffs were not the owners of the property in dispute precludes the idea of a trust having arisen in their favor, *ex maleficio* or otherwise, for in the existence of every trust there are three essential elements, the absence of any one of which is fatal to the trust. These are a trustee, a beneficiary or cestui que trust, and property belonging to the cestui que trust. Here the property proposed to be impressed with a trust does not belong to the plaintiffs, and as to them, is not in trust, they having but an indirect interest therein; and neither the plaintiffs nor any other stockholders have any interest or estate in the property, legal or equitable, which they can enforce in their own right and for their own special benefit. Nor is there any trust relation which enables a stockholder to sue in such a case. "The relation of trustee and cestui que trust, or of debtor and creditor, or of partnership, does not exist between the stockholders of an incorporated company and the corporation itself. But the corporation and the individual shareholder may deal with each other at arm's-length, the same as two strangers may, and a shareholder may contract with his corporation, and sue

and be sued on his contracts": 1 Thompson on Corporations, sec. 1076.

If a right of action exists, because of the alleged fraudulent acts and dealings in relation to the property in controversy, it exists in favor of the corporation, and of necessity the action must be brought in the right of the corporation and for its benefit. If the defendants must account to anyone for the property in litigation, the accounting must be to the corporation, and not to the plaintiffs or any other stockholders. The prayer of this complaint, in effect, asks the court to adjudge that the defendants have obtained for themselves, through fraudulent acts and dealings, the property of the corporation, and instead of asking that the property so obtained, or its proceeds, be returned to the rightful owner, demands that the plaintiffs, for their own benefit, ¹⁹⁴ be decreed a portion of the fruits of the fraud. In other words, according to their prayer, they seek to obtain a portion of the property and assets of a third party, which they say was obtained from such third party by fraud. That a stockholder of a corporation cannot recover corporate property, fraudulently or otherwise disposed of by the officers or agents of the corporation, by suing in his own right and for his own benefit, is settled by the authorities. It is true, where the property or assets of a corporation have been sequestered and dissipated by fraud or otherwise, a stockholder may, if the board of directors will not act, and a suit clearly ought to be brought, sue in the right of the corporation to have its property restored to it, or to obtain for it such other relief as the circumstances may demand, but in no such case can he sue for himself in his own right. This right of a stockholder to sue, in cases of fraud, for the benefit of the corporation, when it will not sue, is an exception to the general rule "that actions to redress wrongs done to a corporation must be brought by the corporation itself, and that such actions cannot be brought by its stockholders": 4 Thompson on Corporations, sec. 4488.

In *Gorham v. Gilson*, 28 Cal. 479—a case much like the one at bar—where a mining company was induced by the fraudulent representations of a part of its stockholders to make a conveyance of its property, and the plaintiffs, stockholders, brought suit in their own right to have conveyed back to themselves such part of the property as was proportional to their stock, Mr. Chief Justice Sanderson, speaking

for the court, and holding that the innocent stockholders could not maintain an action in equity to compel a conveyance to them of such portion of the corporate property, said: "This action proceeds upon the theory (and it could be maintained upon no other) that, in equity, the defendants, by reason of their fraudulent acts, have become the trustees of the plaintiffs to the extent of an undivided half interest in the property in question. But we think ¹⁹⁵ it is clear that the facts set out in the complaint do not sustain that theory. Where, by fraud and deceit, a party is induced to do that which, but for the fraud and deceit, he would not have done, equity will interfere, and so far as it can be done, restore him to his original rights. If the defrauding party has obtained by such means the title to property, equity will convert him into a trustee for the defrauded party, and will compel the execution of the trust by ordering the deed so obtained to be canceled, or the property reconveyed, thus placing the property and the parties where they were originally; thus undoing what has been done, and putting the title where it was before, or, in other words, adjudging that the title remains unchanged and unaffected by the conveyance, because the same is, in equity, null and void, by reason of the fraud and deceit by which it was obtained. Such relief, however, the plaintiffs are not in a position to claim. They never had any title, legal or equitable, to the property in question. They have not only not conveyed anything to the defendants, but they had nothing to convey. The property belonged to the corporation, and not to them, and the corporation, and not they, conveyed it away under the fraudulent inducements in question. So far as any right to the form of relief sought in this action is concerned, the fraud was committed against the corporation, and not against them."

So, in *Abbott v. Merriam*, 8 Cush. 588, Mr. Chief Justice Shaw, speaking of the rights of stockholders, said: "As stockholders, they have rights undoubtedly and interests in the affairs and management of the concerns of the corporation; but these are derivative and indirect, and are limited and regulated by law. They have no right by any direct suit, legal or equitable, to call the directors or other officers of the corporation to account for mismanagement. Nor, if all the stockholders were to unite in a suit in equity, could they have any better ground to recover. The directors and

other officers and agents are amenable only to the corporation, ¹⁹⁶ and to give every individual stockholder a right of action would lead to a multiplicity of suits."

In *Forbes v. Memphis etc. R. R. Co.*, 2 Woods, 323, Fed. Cas. No. 4926, Bradley, circuit judge, said: "A commercial or other business corporation is constituted for the specific purpose of suing and being sued, granting and receiving, buying and selling, and doing other business in a corporate name and capacity, totally distinct from that of any or all of its members, considered as individuals. They have only an indirect interest therein. . . . All remedies for injuries to the property must be prosecuted in the name of the company, and all demands against the company must be prosecuted against the company by name unless its officers or agents, by fraud and misrepresentation, have rendered themselves personally liable. A stockholder, in his character of stockholder, cannot sue, nor, unless specially made liable by the charter, can he be sued for any of the company's transactions": 4 Thompson on Corporations, secs. 4443, 4445; 1 Thompson on Corporations, sec. 1071; *Smith v. Hurd*, 12 Met. (Mass.) 371, 46 Am. Dec. 690; *Smith v. Maine Boys Tunnel Co.*, 18 Cal. 112; *Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *Church v. Citizens' Street Ry. Co. (C. C.)*, 78 Fed. 526; *Big Creek G. C. & I. Co. v. American L. & T. Co. (C. C. A.)*, 127 Fed. 625; *Mickle v. Rochester Bank*, 11 Paige, 118, 42 Am. Dec. 103; *Spurlock v. Missouri Pac. R. Co.*, 90 Mo. 200, 2 S. W. 219; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84; *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827.

There are instances, however, where a stockholder may apply to a court of equity for a preventive remedy by injunction to restrain those who are administering the affairs of the corporation from doing acts which are ultra vires, or to prevent a misapplication of the corporate funds which might result injuriously to the stockholders, where the acts intended to be performed would amount to a breach of trust. In such and like case a preventive remedy may be applied at the instance of a ¹⁹⁷ stockholder, but such cases are wholly different from those like the one at bar.

Mr. Thompson, in his *Commentaries on the Law of Corporations*, volume 4, section 4491, states the distinction thus: "Where an action is brought by one or more stockholders to enjoin the performance of ultra vires, fraudulent or op-

pressive acts on the part of the directors, the remedy is preventive; consisting of an injunction against the performance of such acts, to which may be superadded, in appropriate cases, other forms of equitable relief. Where, on the other hand, the action is brought to undo frauds and breaches of trust already committed, and to restore to the corporation assets thereby wasted, the action does not, as in the former case, proceed in right of the stockholder, but it proceeds in the right of the corporation, and consequently whatever is restored accrues to the corporation."

Where, then, as in this case, the acts complained of have been fully consummated, and the title to the property has passed into the hands of third parties, a stockholder has no remedy to recover, in his own right, any specific or proportionate part of the property for his own benefit. And where the corporate property of such a corporation, in whole or in part, has been sold or disposed of in good faith, under the powers of its charter, and not as a result of fraudulent purposes, the minority stockholder has no cause for complaint, for, as we have seen, a corporation of this character may, in the absence of restraint by the law of its creation, lease, sell, or dispose of any or all of its property, the same as an individual may do respecting his property. This may be done by a majority of the members. The principle that the majority must rule in the management of the affairs of a corporation "is rigidly upheld in equity, in the absence of fraud, oppression, and ultra vires acts": 4 Thompson on Corporations, sec. 4533; 2 Kent's Commentaries, 280-282; Weyeth H. & M. Co. v. James-Spencer-Bateman Co., 15 Utah, 110, 47 Pac. 604; Ardesco Oil Co. v. North American Min. etc. Co., 66 Pa. St. 375; Treadwell v. Salisbury Mfg. Co., ¹⁹⁸ 7 Gray, 393, 66 Am. Dec. 490; Central Transp. Co. v. Pullman P. Car Co., 139 U. S. 24, 50, 11 Sup. Ct. Rep. 478, 35 L. ed. 55; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328.

But suppose this suit were regarded and treated as brought, not in the right of the plaintiffs nor for their own benefit, but in right of all the stockholders, and hence for the corporation and for its benefit; then could the plaintiffs recover? We think not, because viewing this suit in that light, they are met at the very threshold with the judgment in the case of Rogers v. Ferry et al., where the Putnam Mining Company was a defendant, and which forms the special plea

in the answer herein. The plaintiffs, by their demurrer to that plea, have admitted, for the purposes of this case, all the averments properly pleaded therein to be true. Among such averments it appears that that suit was brought and tried in a district court of this state—a court of competent jurisdiction; that the plaintiffs therein sued in right of the corporation, the Putnam Mining Company; that the Putnam Mining Company and the Quincy Mining Company were there, same as here, parties defendant; that the identical cause of action and the identical matters which are herein charged as fraudulent were therein pleaded and tried; that the court adjudged and determined that all the transactions and dealings complained of were lawful and made in good faith, and were without any fraud done or intended; and that neither the Putnam Mining Company nor the plaintiff therein was entitled to any accounting in respect of the matters charged in that complaint; and that such judgment is of record and is still in full force and effect. Thus it clearly appears that the Rogers suit was brought and intended for the purpose of undoing the very transactions complained of in this action as being a fraud on the Putnam Mining Company and its stockholders, and the judgment was that neither the plaintiff nor the corporation was entitled to an accounting. As that suit was brought in the ¹⁸⁹⁹ right of the corporation, that judgment is binding upon the corporation, and by the rule of representation, all the stockholders are equally bound by it. It follows that since the transactions and dealings complained of in that suit are exactly the same transactions and dealings complained of in this action, that judgment, being in full force and effect, is conclusive against the right of the plaintiffs to recover herein; they being stockholders in the corporation. The court having decided that there was no fraud in the transactions in controversy, and that the corporation has no right of recovery, no stockholder can make the same transactions the basis for complaint.

In *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739, 33 L. ed. 184, where the plaintiff in error, who was a stockholder, claimed that a certain order or decree which was binding upon the corporation was void, as against him, because he was not a party to the suit in which the order was made, the supreme court of the United States held that “in the absence of fraud, stockholders are bound by a decree

against the corporation in respect to corporate matters, and such a decree is not open to collateral attack." Mr. Chief Justice Fuller, delivering the opinion of the court, said: "Sued after such an order of court, the defendant does not deny the existence of any one of the facts upon which the order was made, but contends that there has been no call, as to him, because he was not a party to the cause between creditor and corporation. We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member": Freeman on Judgments, secs. 176, 178; Glenn v. Williams, 60 Md. 93; Kessler v. Ensley Co. (C. C.), 123 Fed. 546.

²⁰⁰ The fact that this suit was brought by different parties plaintiff is immaterial since these plaintiffs, as stockholders, were privy to the proceedings in the former suit, and since both suits were identical as to cause of action, subject matter, purpose, and object, quality of persons for or against whom claim is made, and as to the thing adjudged. These legal identities existing, and the same questions involved herein having been judicially settled and determined in the Rogers suit, the judgment in that case is an effectual bar to this action: Freeman on Judgments, secs. 252, 253 et seq.; New Orleans v. Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42 L. ed. 202; Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 197; Lyon v. Perin & Goff Mfg. Co., 125 U. S. 698, 8 Sup. Ct. Rep. 1024, 31 L. ed. 839.

From the foregoing considerations, and from the authorities, the conclusion is inevitable that the court did not err in overruling the demurrer or denying the motion directed at the special plea, nor in rendering judgment in favor of the defendants on the merits.

We find no reversible error in the record. The judgment is affirmed with costs.

Baskin, C. J., and McCarty, J., concur.

The Right of Minority Stockholders to sue in behalf of the corporation is discussed in the monographic note to Jones v. McLester, 97 Am. St. Rep. 29-52; and in the subsequent cases of McCampbell v. Fountain

Head R. R. Co., 111 Tenn. 55, 102 Am. St. Rep. 731; McConnell v. Combination Min. etc. Co., 30 Mont. 239, 104 Am. St. Rep. 703.

The Sale by a Corporation of all its property or assets is discussed in the monographic note to Tanner v. Lindell Ry. Co., 103 Am. St. Rep. 548-572. The consolidation and merger of corporations are discussed in the extended note to Morrison v. American Snuff Co., 89 Am. St. Rep. 604-656.

HIGHLAND BOY GOLD MINING COMPANY v. STRICKLEY.

[28 Utah, 215, 78 Pac. 296.]

EMINENT DOMAIN—Public Use.—What Shall be Considered a public use often depends somewhat upon the locality, the wants and necessities of the people, the conditions with which they are surrounded, and the character of the natural resources of the locality or commonwealth. (p. 713.)

EMINENT DOMAIN—Public Use.—When the Legislature has declared a use to be public, its declaration will be respected and followed by the courts, unless the act is clearly unconstitutional, or the necessity for the taking is plainly without reasonable foundation. (p. 714.)

EMINENT DOMAIN—Public Use—Tramways for Mining.—The construction and operation of roads and tramways for the development and working of mines is a public use. (p. 717.)

APPEAL—Specification of Grounds for Reversal.—Questions discussed by appellants in their brief cannot be considered, if neither the abstract nor brief contains a specification of the points relied upon as grounds for a reversal, as required by rule 6 of the supreme court. (p. 718.)

Frank Hoffman, for the appellants.

Sutherland, Van Cott & Allison, for the respondent.

228 McCARTY, J. Plaintiff brought this action to condemn a right of way for its aerial tramway over defendants' mining claim. The record discloses the following facts, viz.: That plaintiff is a mining corporation and authorized to acquire, maintain and operate aerial tramways for the transportation of ores and other materials. Its mines are situated about two miles from the upper portion of Bingham, and in altitude about two thousand seven hundred feet above the valley. The tramway, which consists of two cables supported on wooden towers, extends from the mines to Bingham. The towers in some places are one thousand feet apart, and in others are close to-

gether, the space depending upon the contour of the ground. In case of gullies they are far apart; in going over ridges they are close together. The buckets run on wheels on the cables, and are moved by a single endless cable to which they are attached. Loaded buckets are carried down, and the empty buckets brought up. Each bucket holds about seven hundred pounds of ore, and in them there is carried over five hundred tons of ore per day every day of the year. This has been continued since the spring of 1899. The plaintiff has in sight ore sufficient to last for about seven years, and reasonably expects, in the meantime, to develop ore for four or five years longer. All this ore is to be taken from the mines to Bingham, then ²²⁹ loaded into railroad cars and shipped to plaintiff's smelter in Salt Lake valley. There is also taken over the tramway from Bingham up to the mines about five tons of coal a day; also supplies used in the operation of the mines are taken up in the same way. The placer claim over which the right of way is sought to be condemned is on a hillside, the surface of which is rough and irregular, and four towers are sufficient to cross the claim. A width of twenty-five feet is required for the towers, and for a team to pass over the ground when necessary for the purpose of making repairs thereon. About two hundred men are employed at plaintiff's mines, and about two hundred at its smelter, which reduces only the ores from plaintiff's mines. A jury was impaneled and assessed the damage caused by the erection and operation of the tramway, and the court entered its findings and decree condemning a right of way for the occupation, maintenance, and use of plaintiff for its tramway. The decree, among other things, provides that "said plaintiff is to move said towers to, or rebuild the same on, at any time, different points on said strip hereby condemned, and as often as requested, and at plaintiff's expense, when reasonably required by the owners of said mining claim for using the part of said claim not sought to be condemned, as well as the part sought to be condemned; and such use of the said part of said surface by said plaintiff is entirely consistent with the use by said defendants of all of said claim, except as aforesaid for the purpose of mining and working the same, and removing the surface again and again; and the said defendants, or the owners of said claim, as the case may be, may work

said claim as they see fit and proper, or otherwise use the same, and whenever the rights herein given to said plaintiff interfere with such use, the said plaintiff is subject to remove said towers, as aforesaid, for the purpose of allowing the owners of such claim full use and enjoyment thereof, except as aforesaid." From that part of the judgment which decrees plaintiff a right of way over defendants' mining ²³⁰ claim, defendants have appealed to this court.

Plaintiff bases its right to condemn on section 3588 of the Revised Statutes of 1898, as amended in 1901 (Sess. Laws, c. 25, p. 19) which provides that: "The right of eminent domain may be exercised in behalf of the following public uses: (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines." Appellants (defendants below) contend that the foregoing provision of the statute is in conflict with section 22, article 1, of the constitution of Utah, which provides that "private property shall not be taken or damaged for public use without just compensation," for the reason that the use made of the right of way sought to be condemned is not a public use.

There appears to be an irreconcilable conflict in the authorities as to what constitutes a public use. This, no doubt, is largely due to the fact that in many cases what would be a public use in one jurisdiction would not be in another or different jurisdiction. Thus it has been almost uniformly held throughout the Pacific coast states that the construction and operation of irrigation ditches is a public use, which doctrine, when applied to the arid region, has been approved by the supreme court of the United States, whereas in Ohio, New York, Pennsylvania, and other states where irrigation is not followed and is practically unknown, it would undoubtedly be held not a public use. Therefore what shall be considered a public use often depends somewhat upon the locality, the wants and necessities of the people, the condition with which they are surrounded, and the nature and character of the natural resources of such locality, state, or commonwealth. And while it is for the legislature to determine, in the first instance, whether the use is a public use, and to provide ²³¹ the means of condemnation, yet the great weight of authority holds that the declaration of the legislature is not

final, and that it is ultimately for the courts to determine whether a particular use is public or not: 1 Lewis on Eminent Domain, 2d ed., 158. The text-writers on eminent domain, and the adjudicated cases, practically all agree that, when the legislature has declared a use to be public, such declaration will be respected and followed by the courts, unless the act is clearly and palpably unconstitutional, or the necessity for the taking is plainly without reasonable foundation: 2 Dillon on Municipal Corporations, 4th ed., 600; United States v. Gettysburg Elec. Ry. Co., 160 U. S. 668, 16 Sup. Ct. Rep. 427, 40 L. ed. 576; Dayton Min. Co. v. Seawell, 11 Nev. 394; Tuttle v. Moore, 3 Ind. Ter. 712, 64 S. W. 585; Mills on Eminent Domain, 2d ed., 10; Lewis on Eminent Domain, 158; 10 Am. & Eng. Ency. of Law, 2d ed., 1070. For a further discussion of the general and well-established rule that legislative enactments are presumed to be constitutional unless the contrary clearly appears, see Fletcher v. Peck, 6 Cranch, 128, 3 L. ed. 162; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Stewart v. Board of Supervisors, etc., 30 Iowa, 9, 1 Am. Rep. 238; State v. Tingey, 24 Utah, 225, 67 Pac. 33, and cases cited; State v. Lewis, 26 Utah, 120, 72 Pac. 388.

The reason for the rule, when applied to the law of eminent domain, is very apparent, as there are some uses for which private property may be condemned the public character of which is so plain that there is no room for argument; and, on the other hand, there are innumerable uses for which property may be and is used, the private character of which is equally clear and plain. As stated by counsel for respondent, in their brief: "Between these two extremes, however, courts can approach a dividing line which is so shadowy that it leaves room for argument as to whether or not a statute is constitutional. A short distance on either side of the line the decision is plain, but on the line, and for a short distance on each side, it is doubtful." And, as ²³² hereinbefore stated, whenever the court is in doubt, it holds the statute constitutional. Therefore, unless it clearly appears that the use made of the right of way in question is private and in no sense public, the validity of the statute must be upheld. Some general rules by which the question as to what constitutes a public use may be determined were declared by this court in the case of Nash v. Clark, 27 Utah, 158, 101 Am. St. Rep. 953, 75

Pac. 371. In that case it was in effect held that when the taking is for a use that will promote the public interest, and which tends to develop the great natural resources of the state, such taking is for a public use.

The mining industry in this state is second in importance only to that of irrigation, and this court held in the case of *Nash v. Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371, that the construction and operation of irrigation ditches is a public use. Counsel for appellants, in his brief, concedes "that irrigation is a public use, and that the condemnation of lands for irrigation ditches is for a public use"; and again he says: "There is no person, I take it, of ordinary intelligence, that would assert or think for a moment that the system of irrigation, as adopted and used throughout this whole western country, is not surely a public benefit and a public use." In *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444, the court, after speaking of the interests that New Hampshire had in the improvement and development of her natural water power, say: "No state of the Union is more interested than ours in the improvement of natural advantages for the application of water power to manufacturing purposes. Nature has denied to us the fertile soil and genial climate of other lands, but by way of compensation has endowed us with unrivaled opportunities of turning our streams of water to practical account. The present prosperity of the state is largely due to what has already been done toward developing these natural advantages, and there is no assignable limit to our resources in this respect if extended and connected enterprises for the improvement of the ²³³ water power in the state should be successfully prosecuted hereafter. In no part of the world have the public a deeper interest in the success of all undertakings which promise to assist in the development of these great natural advantages. Whether we look to the interpretation which has been given in other jurisdictions to the term 'public use,' in reference to the right of taking private property for such a use, to the legislative practice under the provincial and state governments before and at the time when the constitution was adopted, to the language of the constitution itself, to the early and continued legislative practice under the constitution, to the decisions of the courts in this state or to the character of our business and the natural productions and resources

of the state, we are drawn to the conclusion that the legislature have power to authorize a private right that stands in the way of an enterprise set on foot for the improvement of the water power in a large stream like this river to be taken without the owner's consent, if suitable provision is made for his compensation, and that the act of the legislature is constitutional and valid."

The same reasons that hold that manufacturing is necessary to the public welfare in New Hampshire and other New England states can be urged in behalf of mining in Utah and other western states. The mining industry in this state, and in others similarly situated, not only produces a home market for the products of the farm, and furnishes thousands of men with steady employment at liberal and remunerative wages, but also produces wealth which has enabled other industries to be created and to flourish, which, without the stimulus thus furnished, would languish. In *Dayton Min. Co. v. Seawell*, 11 Nev. 394, Mr. Chief Justice Hawley, speaking for the court, aptly portrays some of the conditions and disadvantages under which the mining industry is prosecuted in this intermountain region, as well as some of the benefits derived therefrom, as follows: "The mining and milling interests give employment to many ²³⁴ men, and the benefits derived from this business are distributed as much and sometimes more among the laboring classes than with the owners of the mines and mills. The mines are fixed by the laws of nature, and are often found in places almost inaccessible. For the purpose of successfully constructing and carrying on the business of mining, smelting, or other reduction of ores, it is necessary to erect hoisting works, to build mills, to construct smelting furnaces, to secure ample grounds for dumping waste, rock, and earth; and a road to and from the mine is always indispensable. The sites necessary for these purposes are often confined to certain fixed localities." We have in this state, in addition to the extensive deposits of gold, silver, lead, and copper ores, large areas of lands containing coal in almost limitless quantities, and we depend almost exclusively upon the coal mines for the fuel used in our manufacturing establishments and for domestic purposes. Now, it is of vital importance to the people that the coal, as well as the other hidden resources of the state, be opened up and developed,

and that the mining industry in general, which has been the source of so much wealth to the people of this and other western states, be conducted on the same extensive scale in the future that has characterized its operations in the past. Therefore, the public policy of the state, as exemplified by the act of the legislature under consideration, is to encourage the people to open up and exploit the mines with which the state abounds, and thereby not only give to the state the wealth which will enable other industries to be created, but furnish thousands of laborers with remunerative employment.

It being conceded, and this court having held, that the construction and operation of irrigating ditches in this state is a public use (*Nash v. Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371), it follows that the construction of roads and tramways for the development of the mining industry is a public use, as the same line of reasoning that applies in support of the doctrine in the one case holds good in the other. ²³⁵ Otherwise a party owning a few acres of farming land, or only a few square rods for that matter, could invoke the law of eminent domain, and by condemnation proceedings acquire a right of way across his neighbor's land for an irrigation ditch to convey water to his small holdings; whereas the owners of mines and of works for the reduction of ores, the operations of which furnish thousands of men in this state with employment at good wages, and to which the general prosperity of the state is largely due, would be denied the right to invoke this same rule of law in order to acquire, when necessary to the successful operation of their business, rights of way for the transportation of ores from the mines to the mills and smelters, and for the construction of tunnels for drainage and other purposes. And parties holding the title to ground necessary and suitable for these purposes, which, in many cases, except for such purposes, might be entirely worthless, would be clothed with power to demand and compel payment of an unconscionable price for their lands before parting with the title, or they could refuse, absolutely, to grant the easement required on any terms, and thereby in some cases cripple mining enterprises, or destroy them altogether. Such a policy would not only be inconsistent and unreasonable, but would greatly retard the development of one of the greatest natural resources of

the state. We are therefore of the opinion, and so hold, that the construction and operation of roads and tramways for the development and working of mines is a public use. The act of the legislature under consideration makes ample provision for the payment of a fair price to the owner for lands sought to be condemned, and for all damages that he may suffer because of such taking, and is therefore void.

There are several other questions of minor importance raised and discussed by appellants in their brief, but as neither the abstract nor brief contain ²³⁶ a specification of the points relied upon as grounds for a reversal, as required by rule 6 of this court (49 Pac. xi), they cannot be considered.

The judgment of the trial court is affirmed, with costs.

Bartch, J., concurs.

Baskin, C. J., concurs in the affirmance of the judgment.

The Condemnation of Land under the power of eminent domain for railroads and tramways in aid of mining and lumbering is discussed in the recent monographic note to Zircle v. Southern Ry. Co., 102 Am. St. Rep. 829, 830. In the case of Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, it is held that a statute purporting to authorize the taking of land to improve the navigation of a stream is unconstitutional, if the improvement of the navigability is intended to secure water power to be used for private purposes, as well as to enable the carrying on of the transportation business.

The judgment in this case was affirmed in Strickley v. Highland Boy Gold Min. Co., 201 U. S. 527, 50 L. ed. 000, 26 Sup. Ct. Rep. 000, where the court, by Mr. Justice Holmes, said:

“This is a proceeding begun by the defendant in error, a mining corporation, to condemn a right of way for an aerial bucket line across a placer mining claim of the plaintiffs in error. The mining corporation owns mines high up in Bingham canyon, in West Mountain mining district, Salt Lake county, Utah, and is using the line or way to carry ores, etc., for itself and others from the mines, in suspended buckets, down to the railway station, two miles distant, and twelve hundred feet below. Before building the way it made diligent inquiry, but could not discover the owner of the placer claim in question, Strickley standing by without objecting or making known his rights while the company put up its structure. The trial court found the facts and made an order of condemnation. This order recites that the mining company has paid into court the value of the right of way, as found, and costs, describes the right of way by metes

and bounds, and specifies that the same is to be used for the erection of certain towers to support the cables of the line, with a right to drive along the way when necessary for repairs, the mining company to move the towers as often as reasonably required by the owners of the claim for using and working the said claim. The foregoing final order was affirmed by the supreme court of the state: 28 Utah, 215, ante, p. 711, 78 Pac. 296. The case then was brought here.

“The plaintiffs in error set up in their answer to the condemnation proceedings that the right of way demanded is solely for private use, and that the taking of their land for that purpose is contrary to the fourteenth amendment of the constitution of the United States. The mining company, on the other hand, relies upon the statutes of Utah, which provide that ‘the right of eminent domain may be exercised in behalf of the following public uses: . . . (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines’: Utah Rev. Stats. 1898, sec. 3588. In view of the decision of the state court we assume that the condemnation was authorized by the state laws, subject only to the question whether those laws, as construed, are consistent with the fourteenth amendment. Some objections to this view were mentioned, but they are not open. If the statutes are constitutional as construed, we follow the construction of the state court. On the other hand, there is no ground for the suggestion that the claim by the plaintiffs in error of their rights under the fourteenth amendment does not appear sufficiently on the record. The suggestion was not pressed.

“The single question, then, is the constitutionality of the Utah statute, and the particular facts of the case are material only as showing the length to which the statute is held to go. There is nothing to add with regard to them, unless it be the finding that the taking of the strip across the placer claim is necessary for the aerial line, and is consistent with the use of all of the claim by the plaintiffs in error for mining, except to the extent of the temporary interference over a limited space by four towers, each about seven and one-half feet square and removable, as stated above.

“The question, thus narrowed, is pretty nearly answered by the recent decision in *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085. That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the state. In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon

due compensation, which, under other circumstances, would be left wholly to voluntary consent. In such unusual cases there is nothing in the fourteenth amendment which prevents a state from requiring such concessions. If the state constitution restricts the legislature within narrower bounds, that is a local affair, and must be left where the state court leaves it in a case like the one at bar.

“In the opinion of the legislature and the supreme court of Utah the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The constitution of the United States does not require us to say that they are wrong. If, as seems to be assumed in the brief for the defendant in error, the finding that the plaintiff is a carrier for itself and others means that the line is dedicated to carrying for whatever portion of the public may desire to use it, the foundation of the argument on the other side disappears.

“Judgment affirmed.”

BRIXEN v. JORGENSEN.

[28 Utah, 290, 78 Pac. 674.]

EJECTMENT by a Vendor Against His Vendee.—Where a vendee takes possession of property under a contract of purchase and pays a portion of the price, the vendor cannot maintain ejectment against him for a failure to pay the balance, if the contract does not provide that time is of the essence, nor stipulate that a forfeiture will arise from a default in payment, and there is no rescission, repudiation, nor abandonment of the contract. (pp. 721, 722.)

McGurrin & Gustin, for the appellant.

Christensen & Christensen, for the respondents.

295 BASKIN, C. J. This is an action of ejectment to recover possession of the tract of land described in the complaint. The case was tried without a jury. The findings of fact and conclusions of law in the court below fully appear from the following extract from the opinion of the trial judge, which is set out in the record, to wit: “From the evidence submitted at the trial I find that neither the plaintiff nor the defendants have set out the terms of the contract of sale and purchase in the complaint or answer. The evidence shows that the contract was in writing, but that it has been lost and cannot be found. By its terms the

plaintiff agreed to sell to the defendants, and the defendants to purchase from the plaintiff, the land described in the complaint, with four shares of first-class water right, to be used in irrigating the lands until about the first day of July of each year, and two shares for the balance of the year, ²⁹⁶ ending December 31st, for the sum and purchase price of \$2,500, payable as follows: Cash, \$250; March 1, 1902, the further sum of \$750; and March 1, 1905, the further and final sum of \$1,500—with interest on the deferred payments at the rate of six per cent per annum. At the execution and delivery of the contract the defendants paid plaintiff \$250, and subsequently entered into possession of the premises, and have ever since been, and are now in such possession. Also that between March and June, 1902, defendants at various times made partial payments aggregating \$250, and also on July 9 or 10, 1902, paid \$200 more, making a total payment of \$450 upon the installment of purchase money to be paid March 1, 1902, and leaving a balance of \$300 due and unpaid upon that installment; and that no other payments have been made by the defendants to the plaintiff. It is not stipulated in the contract that time was of its essence, nor did the contract contain a provision for forfeiture upon failure to pay any part of the purchase money. The evidence does not show that there was a rescission or cancellation or an abandonment or repudiation of the contract of purchase; and, time not being of the essence of the contract, it would seem that the action of ejectment, as in this case, is not the proper remedy; that the plaintiff has a vendor's lien upon the premises to secure the payment of the purchase money, and her action is one to foreclose such lien." There are no exceptions to the findings of facts. A judgment dismissing the action was made and entered. The appeal is from that judgment.

The law applicable to the facts found is aptly stated in 7 Encyclopedia of Pleading and Practice, 319, 320, as follows: "Ejectment may be maintained by a vendor to recover possession of real estate from a purchaser who has gone into possession, with the permission of the vendor, under a contract of purchase, with the terms of which he fails or refuses to comply; the vendor being then at liberty to treat the contract as rescinded, provided the contract be first legally rescinded by the vendor, by repaying the ²⁹⁷ purchase money already paid, with legal interest thereon, less a fair rental

for the premises, and delivering up the notes or bonds given for the balance of the purchase money, or offering to do so. In other words, the vendor must place the vendee in statu quo. This at least is the general rule": See cases therein cited; also *Staley v. Murphy*, 47 Ill. 241; *Bohall v. Diller*, 41 Cal. 532; *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239.

We are of the opinion that, under the facts found, ejectment cannot be maintained. As to the proper remedy we express no opinion.

The judgment is affirmed with costs.

Bartch and McCarthy, JJ., concur.

WHEN A VENDOR MAY RECOVER POSSESSION FROM HIS VENDEE.

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I. Right of Recovery of Possession.

a. Default of Vendee in General.—If a vendor of real property, while retaining the legal title, puts his vendee in possession under an agreement for a deed and conveyance in the future, and the vendee fails or refuses to comply with the terms of the agreement, as by neglecting or declining to pay the first or any subsequent installment of the purchase price, the general rule is well established that the vendor may maintain an appropriate action for the recovery of

the possession of the premises: *Clements v. Taylor*, 65 Ala. 363; *Hicks v. Lovell*, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942; *Alston v. Wingfield*, 53 Ga. 18; *Austin v. Wilson*, 50 Iowa, 207; *Wright v. Moore*, 21 Wend. 230; *Jones v. Boyd*, 80 N. C. 258; *Mitchell v. De Roche*, 1 Yeates (Pa.), 12; *Lowry v. Mehaffy*, 10 Watts, 387; *Moyer v. Garrett*, 96 Pa. St. 376; *Brown v. Devitt*, 131 Pa. St. 455, 19 Atl. 80; *Browning v. Estes*, 3 Tex. 462, 49 Am. Dec. 760; *Williamson v. Paxton*, 18 Gratt. 475.

An action will not lie, however, until the vendee is in some manner in default: *Hutchinson v. Coonley*, 209 Ill. 437, 70 N. E. 686. And the burden is on the vendor to show such default: *Roland v. Fischer*, 30 Ill. 224. "Ejectment is not maintainable by a vendor of real property against his vendee in possession under an executory contract of sale, who is not in default in the performance of his contract, or who has performed it and is in a condition to demand a deed, or who seasonably and in good faith offers to comply with the terms of his purchase and continues ready to comply with them. To a vendee in possession under such circumstances the contract will avail him as an equitable defense to an action of ejectment brought against him by his vendor, or as a cross-action in equity to enforce a trust against his vendor, or to obtain a specific performance of the contract": *Hicks v. Lovell*, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942.

b. **Form or Nature of Conveyance.**—The right of a vendor to recover possession as against his vendee is most frequently recognized, as the cases cited in the preceding paragraphs will disclose, in case of the ordinary executory contracts of sale or bonds for title. Where the vendor retains a lien for the purchase money in his deed or in the notes for deferred payments, it is held that the contract is executory, and he may recover possession of the property if the vendee makes a default: *Peters v. Clements*, 46 Tex. 114; *White v. Cole*, 9 Tex. Civ. App. 277, 29 S. W. 1148; *Curran v. Texas Land etc. Co.*, 24 Tex. Civ. App. 499, 60 S. W. 466; *Sanders v. Rawlings* (Tex. Civ. App.), 77 S. W. 41. But where a conveyance is made, and a bond is taken back to secure payment, it has been held that the property cannot be recovered in ejectment: *Megargel v. Saul*, 3 Whart. (Pa.) 19. Compare *Stow v. Tift*, 15 Johns. 458; *Burgess v. Millican*, 50 Tex. 397; *Dunlap v. Wright*, 11 Tex. 597, 62 Am. Dec. 506. Where a conveyance is made upon the condition that the deed shall be void if the grantee does not make specified payments, the grantor may recover possession after a breach by the grantee of the condition: *Fisk v. Chandler*, 30 Me. 79, 1 Am. Re. 612.

c. **Forfeiture Clauses.**—Whether or not an executory contract to convey land contains a condition for a forfeiture in the event of the vendee making a default in his payments, is a question having an important bearing upon the right of the vendor to recover possession of the premises in case the vendee fails to comply with the terms of

the agreement. In the principal case (*ante*, p. 720), the supreme court of Utah holds that where an agreement of sale does not provide for a forfeiture, nor stipulate that time is of the essence, a vendor cannot maintain ejectment against his vendee when the latter has paid a portion of the purchase price, but fails to pay the remainder, if there has been no abandonment of the contract. On the other hand, it is decided in *Vito v. Birkel*, 209 Pa. St. 206, 58 Atl. 127, that if the contract declares that in case the vendee fails to make his payments on certain dates, he shall forfeit as liquidated damages the amount of money already paid, a failure to perform on the day stipulated *ipso facto* involves a forfeiture, and the vendor becomes entitled to possession, without the necessity of any affirmative act on his part. See, further, "Notice of Rescission or Forfeiture," *post*.

d. **Time as Essence.**—The cases cited in the foregoing paragraph also recognize that whether or not time is made of the essence of contracts to convey is an important factor in determining the question of the vendor's right to possession upon the vendee's default. In the principal case, where time was not of the essence, the court expressed the opinion that the vendor could not maintain ejectment on the ground that the vendee was in default in paying the balance due under the contract, there being no abandonment of the agreement on his part: See, too, *Jones v. Hollister*, 51 Kan. 310, 32 Pac. 1115. But in *Vito v. Birkel*, 209 Pa. St. 206, 58 Atl. 127, the court, after stating the terms of the contract, observed: "Time was thus made of the essence of the contract, and, being so, a failure to perform on the day agreed, *ipso facto*, involved the stipulated forfeiture, without the necessity of any affirmative act of the vendor."

II. Form of Action or Procedure Adopted.

a. **Re-entry and Resumption of Possession.**—Upon the default of the vendee in possession under an executory contract for the sale of lands, the vendor may, if he can do so peaceably, enter and resume possession, especially where the vendee has abandoned the premises: *McHan v. Stansell*, 39 Ga. 197; *Dean v. Comstock*, 32 Ill. 173; *Welch v. Emerson*, 95 Pa. St. 251; *Bell v. Clark*, 111 Pa. St. 92, 2 Atl. 80; *Burgess v. Millican*, 50 Tex. 397.

b. **Action of Ejectment.**—Where a vendee declines to perform the executory contract of sale under which he has taken possession of the property, ejectment is usually regarded as a proper remedy for the vendor to employ to enforce his rights, and perhaps it is the remedy most frequently invoked for that purpose: *Woodward v. Hennen*, 128 Cal. 293, 60 Pac. 769; *Thompson v. Ellenz*, 58 Minn. 301, 59 N. W. 1023; *Rose v. Loyd*, 98 Mo. 253, 11 S. W. 622; *Pratt v. Peckham*, 44 Hun, 247; *Pierce v. Tuttle*, 53 Barb. 155; *Love v. Jones*, 4 Watts. 465; *Daubert v. Pennsylvania R. R. Co.*, 155 Pa. St. 178, 26 Atl. 108; *Burnett v. Caldwell*, 76 U. S. (9 Wall.) 290, 19 L. ed. 712.

To quote from *Whittier v. Stege*, 61 Cal. 241: "When, therefore, the defendants, after they had obtained possession lawfully, substituted repudiation of the contract and refusal to comply with its terms, for performance or willingness to perform, they divested themselves by their wrongful act of the equitable estate which they acquired under the contract, and became trespassers or tenants at will, against whom their repudiated vendors could maintain ejectment. The vendors were remitted to their legal title, and in an action upon it the defendants could not invoke as a defense to it a contract of sale which they had repudiated and refused to perform."

c. **Trespass to Try Title.**—In Texas, the vendor may maintain trespass to try title against his vendee, where the latter declines to comply with the contract under which he has taken possession of the property: *Baumgarten v. Smith*, 37 Tex. 439; *Keys v. Mason*, 44 Tex. 140.

d. **Summary Proceedings.**—Such summary proceedings as unlawful detainer are, unless the statute expressly gives them a wider scope, generally regarded as applicable only in those cases where the relation of landlord and tenant exists by convention, and are therefore not available to a vendor to recover possession from his vendee when the latter makes a default in the performance of his contract of purchase: *Mason v. Delancy*, 44 Ark. 444; *People v. Bigelow*, 11 How. Pr. 83; *Burkhart v. Tucker*, 27 Misc. Rep. 724, 59 N. Y. Supp. 711; *Diggle v. Baulden*, 48 Wis. 477, 4 N. W. 678. In some jurisdictions, however, the statutes expressly extend this summary remedy and make it available in this class of cases: *Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278; *Haskins v. Haskins*, 67 Ill. 446; *Leshner v. Sherwin*, 86 Ill. 420. Under this rule, an assignee of the vendor may institute the proceedings as well as the vendor himself: *Vos v. Dykema*, 26 Mich. 399; and the proceedings can be maintained against one whom the vendee puts in possession: *Jackson v. Warren*, 32 Ill. 331. It has been held that an action of unlawful detainer lies where a vendee takes possession under a parol contract of sale which he subsequently repudiates: *McKissack v. Bullington*, 37 Miss. 535; *Beard v. Bricker*, 32 Tenn. (2 Swan.) 50; *Sullivan v. Ivey*, 34 Tenn. (2 Sneed), 487.

III. Conditions Precedent to Recovery.

a. **Tender of Deed.**—It is said that one in possession of land under an agreement for a conveyance is in legal and rightful possession, so that ejectment will not lie against him, until he is not only in default of payment, but also until his vendor tenders a deed and demands payment of the unpaid purchase price: *Bolton v. Roebuck*, 77 Miss. 710, 27 South. 630; *Gregg v. English*, 38 Tex. 139. A contrary doctrine is laid down in *Wright v. Moore*, 21 Wend. 230; *Hotaling v. Hotaling*, 47 Barb. 163. A tender is not necessary, however, if only a part of the purchase price is due, and the time for making a

conveyance has not yet arrived: *Reddish v. Smith*, 10 Wash. 178, 45 Am. St. Rep. 781, 38 Pac. 1003. Moreover, the vendor does not lose his right of action to recover the land by not tendering a deed upon the day the last payment fell due: *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872. And in Pennsylvania a tender need not be made before suit is brought, one made at the trial being sufficient: *Devling v. Williamson*, 9 Watts, 311; *Hall v. Holmes*, 4 Pa. St. 251; *Cadwalader v. Berkheiser*, 32 Pa. St. 43. But see *Hutchinson v. Coonley*, 209 Ill. 437, 70 N. E. 686, where it is stated that the rights to be determined in the case are those that existed at the time suit was commenced.

b. **Notice of Rescission or Forfeiture.**—It seems necessary, at least under some of the authorities, that the vendor, before instituting an action to recover the premises because of the vendee's default, must give notice of his intention to rescind the contract of sale, or, if a forfeiture is provided for, to give notice of an intention to claim it: *Courtney v. Woodworth*, 9 Kan. 443; *Dennis v. Warder*, 42 Ky. (3 B. Mon.) 173; *Getty v. Peters*, 82 Mich. 661, 46 N. W. 1036, 10 L. R. A. 465; *Corning v. Loomis*, 111 Mich. 23, 69 N. W. 85. Of course, this question will largely depend upon the terms of the contract. Said Justice Ostrander in *Miner v. Dickey* (Mich.), 103 N. W. 855: "We do not mean to hold that parties to such a contract may not stipulated that a specified breach . . . shall at once determine the relations, and work a forfeiture of the vendee's rights thereunder. The contract in this case does not so stipulate. The provision is that after breach the vendor shall have a right to declare the contract void. The rule that the vendor must terminate the contract relations by notice of forfeiture or otherwise, or that the defendant must do some act or thing which of itself determines the contract relation, before proceedings to recover possession of premises can be begun, is well settled": See, further, "Forfeiture Clauses," ante; *Fears v. Merrill*, 9 Ark. 559, 50 Am. Dec. 226.

c. **Notice to Quit.**—When a vendee is put into possession under a contract for the purchase of land, and thereafter fails to comply with the terms of his agreement, he is not, by the weight of authority, regarded as a tenant of the vendor in such a sense as to be entitled to a notice to quit before an action may be brought by the vendor to recover possession of the premises: *Chapman v. Glassell*, 13 Ala. 50, 48 Am. Dec. 41; *Coates v. Cleaves*, 92 Cal. 427, 28 Pac. 580; *Knox v. Spratt*, 19 Fla. 817; *McHan v. Stansell*, 39 Ga. 197; *Dean v. Comstock*, 32 Ill. 173; *Doe v. Brown*, 7 Blackf. 142, 41 Am. Dec. 217; *Glasscock v. Robards*, 14 Mo. 350, 55 Am. Dec. 108; *Ross v. Van Aulen*, 42 N. J. L. 49; *Jackson v. Miller*, 7 Cow. 747; *Jackson v. Moncrief*, 5 Wend. 26; *Powers v. Ingraham*, 3 Barb. 576; *Pierce v. Tuttle*, 53 Barb. 155; *Baker v. Gittings*, 16 Ohio, 485; *Den v. Webster*, 18 Tenn. (10 Yerg.) 513; *Burnett v. Caldwell*, 76 U. S. (9 Wall.) 290, 19 L. ed. 712. A contrary view, however, seems to prevail in some jurisdictions (*Fears*

v. Merrill, 9 Ark. 559, 50 Am. Dec. 226; Dennis v. Warder, 42 Ky. (3 B. Mon.) 173; Hope v. Cason, 42 Ky. (3 B. Mon.) 544; Costigan v. Wood, 5 Cranch, 507, Fed. Cas. No. 3265), unless the vendee dissevers the relation between himself and the vendor, as by claiming to hold independently of him: Bedford v. Thomas, 47 Ky. (6 B. Mon.) 493. Three weeks' notice to quit has been held sufficient before bringing ejectment: Butner v. Chaffin, 61 N. C. 497. But one day has been thought insufficient: Guess v. McCanley, 61 N. C. 514. That six months' notice is not necessary: Venable v. McDonald, 34 Ky. (4 Dana), 386.

d. Demand of Possession.—Many authorities take the view that where a vendee in possession under an executory contract to purchase lands fails to comply with the terms of his agreement, the vendor may maintain ejectment against him without first making a demand for the possession of the property: Chapman v. Glassell, 13 Ala. 50, 48 Am. Dec. 41; Dean v. Comstock, 32 Ill. 173; Hotaling v. Hotaling, 47 Barb. 163; Pierce v. Tuttle, 53 Barb. 155; Gregg v. Von Phul, 68 U. S. (1 Wall.) 274, 17 L. ed. 536. It would not seem unreasonable, however, to hold that the vendor, having put the vendee in possession, cannot, without a demand for possession and a refusal by the vendee to yield it, or some wrongful act on the part of the latter, treat the vendee as a wrongdoer, as must be assumed when ejectment is instituted: Twyman v. Hawley, 24 Gratt. 512, 18 Am. Rep. 661; Peters v. Allison, 40 Ky. (1 B. Mon.) 232, 36 Am. Dec. 574. In case the contract of sale gives the vendor the right to enter and take possession, he need make no demand before bringing ejectment: Den v. McShane, 13 N. J. L. 35. And where the vendee has been out of possession several years after default in his payments, and then re-enters, no demand is necessary to make his possession tortious: Connolly v. Hingley, 82 Cal. 642, 23 Pac. 273.

In Williamson v. Paxton, 18 Gratt. 491, approved in Pettit v. Cowherd, 83 Va. 20, 1 S. E. 392, it was declared that "one who is put in possession upon an agreement for the purchase of land, cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise; and the action of unlawful detainer stands on the same footing in this respect with the action of ejectment." The demand must be in writing, under the forcible detainer statute of Illinois: Swetitsch v. Waskow, 37 Ill. App. 153. Unless the statute requires more, however, an oral demand would appear sufficient: Bruschi v. Quail Min. etc. Co. (Cal.), 81 Pac. 404. A notice in summary proceedings must show plainly the grounds on which the proceeding is instituted: Carlisle v. Prior, 48 S. C. 183, 26 S. E. 244.

e. Demand of Payment.—"The authorities hold beyond any question," it is said in Hotaling v. Hotaling, 47 Barb. 163, "that when the purchaser of land has made default in the payment of money, un-

der an executory contract, no notice to quit is necessary, nor any demand of the amount due, or of the possession, or tender of a deed, before bringing an action of ejectment." The law as thus stated is by no means so clear or beyond dispute as this statement might lead one to suppose. While contracts for the sale of land undoubtedly may be so drawn that the vendee will be in default and liable to an action in ejectment by force of his mere failure to comply with his agreement in the matter of making payments, authorities are not wanting for the general principle that a demand of the amount due is a condition precedent to the right of action: *Home Mfg. Co. v. Gough*, 2 Ill. App. 477; *Bolton v. Roebuck*, 77 Miss. 710, 27 South. 630; *Gregg v. English*, 38 Tex. 139; *Costigan v. Wood*, 5 Cranch, 507, Fed. Cas. No. 3265.

f. **Return of Consideration.**—Where a vendor rescinds an executory contract of sale under which he has put his vendee in possession, he must restore to the vendee the purchase money paid or the purchase notes given: *Bohall v. Diller*, 41 Cal. 532; *Staley v. Murphy*, 47 Ill. 241; *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239. But if, on the other hand, the vendee refuses further to perform the contract, then the vendor may, without returning such purchase money as has already been paid, maintain ejectment against him (*Hoffman v. Remnant*, 72 Cal. 1, 12 Pac. 804; *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 271; *Knox v. Spratt*, 19 Fla. 817; *Page v. Cole*, 6 Iowa, 153; *Harison v. Caswell*, 52 N. Y. Supp. 664); or, in some jurisdictions, trespass to try title (*Walsh v. Ford*, 27 Tex. Civ. App. 573, 66 S. W. 854; *Banks v. McQuatters* (Tex. Civ. App.), 57 S. W. 334); or, in other jurisdictions, forcible detainer: *Wilburn v. Haines*, 53 Ill. 207. The vendee's rights are not enlarged by the fact that the vendor still holds the notes of the vendee, if he offers to surrender them at the trial: *Williams v. Murphy*, 21 Minn. 534.

IV. Persons Involved in Action.

a. **As Parties Plaintiff.**—If a grantee in possession under an executory contract of purchase is in default in the performance of his agreement, but the circumstances are such that the vendor could not recover possession of the property, then a grantee of the vendor, with knowledge of the facts, cannot maintain ejectment: *Courtney v. Woodworth*, 9 Kan. 443. But if the circumstances and character of the default are such that the vendor would be entitled to recover possession by an action in ejectment, trespass to try title, or unlawful detainer, as the case may be, then his grantee is entitled to pursue the same remedy: *Monsen v. Stevens*, 56 Ill. 335; *Vos v. Dykema*, 26 Mich. 399; *Condee v. Haywood*, 34 Barb. 349; *Emery v. De Golier*, 117 Pa. St. 153, 12 Atl. 152; *Ellis v. Hannay* (Tex. Civ. App.), 64 S. W. 684; and so are his heirs: *Renfro v. City of Waco* (Tex. Civ. App.), 33 S. W. 766; *Smith v. Pate* (Tex. Civ. App.), 43 S. W. 312; *McBae*

v. Poor (Tex. Civ. App.), 48 S. W. 47; and the assignee of his vendor's lien note and legal title: New England Loan etc. Co. v. Willis, 19 Tex. Civ. App. 128, 47 S. W. 389; Jackson v. Bradshaw, 24 Tex. Civ. App. 30, 57 S. W. 878. The vendor cannot maintain an action after having transferred the purchase money notes and his title to the property to another: Clymer v. Powell, 56 Miss. 672. And after he transfers the notes given him for the purchase price, without recourse, he cannot maintain ejectment, on his own account, to recover the property: Tompkins v. Williams, 19 Ga. 569.

b. **As Parties Defendant.**—An action of trespass to try title may be maintained by a vendor against his vendee's grantee, who assumes the vendor's lien notes but fails to pay them, and who, on taking an assignment of a debt against the vendor and of the notes as collateral, claims the ownership of the notes and that they are barred by the statute of limitations: Smith v. Cottingham, 20 Tex. Civ. App. 303, 49 S. W. 145. If the statutes provide that summary proceedings may be instituted against a vendee in default, such proceedings may be brought against one whom the vendee puts in possession: Jackson v. Warren, 32 Ill. 331.

V. Equities and Defenses of Vendee.

a. **Tender of Performance.**—When a vendor brings an action to recover property in the possession of his vendee under a contract of purchase, the vendee, as a rule, can defend the action only by showing a performance of the contract on his part: Gibbs v. Sullens, 48 Mo. 237. But so long as the vendee recognizes the agreement and continues to perform its terms, he can defend his possession as against the vendor: Haile v. Smith, 113 Cal. 656, 45 Pac. 872. See, too, Davis v. Benedict (Ky.), 4 S. W. 339; Estell v. Cole, 52 Tex. 170. "Ejectment is not maintainable by a vendor of real property against his vendee in possession under an executory contract of sale, who is not in default in the performance of his contract, or who has performed it and is in a position to demand a deed, or who seasonably and in good faith offers to comply with the terms of his purchase, and continues ready to comply with them. To a vendee in possession under such circumstances, the contract will avail him as an equitable defense to an action of ejectment brought against him by his vendor, or as a cross-action in equity to enforce a trust against his vendor, or to obtain specific performance of the contract. But if after maturity of the purchase money the vendor tenders a deed and demands payment, which the vendee refuses to make, or if the vendee has abandoned the purchase and repudiates the title of his vendor, in such case the vendee forfeits the benefit of the contract, and he cannot avail himself of it as a defense to an action of ejectment by his vendor, nor by way of a cross-action for specific performance": Ricks v. Lovell, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942.

b. **Equities in General.**—A recovery by a vendor against his vendee in ejectment or unlawful detainer determines the right of possession but does not necessarily affect the equities of the parties: *Page v. Cole*, 6 Iowa, 153; *Abbott v. Chase*, 13 Iowa, 453; *Moak v. Bryant*, 51 Miss. 560. In recognizing the right of a vendor to maintain ejectment against his vendee, who refuses to comply with terms of his contract of purchase, the court in *Alston v. Wingfield*, 53 Ga. 18, said: "This works no wrong to the vendee, at least as between him and the purchaser, for he can always in equity, and perhaps under the code, at law, pay or offer to pay by bringing the money into court, the amount due, and demand his title." And in *Central Pac. R. R. Co. v. Mudd*, 59 Cal. 585, the court said: "Where a separate court of equity exists, if the vendor brings his action at law to recover the possession, the purchaser may go into equity within a reasonable time, where time is not of the essence, offer payment of the balance due, with interest, and obtain a decree for a performance of the contract. In California, he may attain the same end by filing a cross-complaint. It is also true that, under our system, the defendant, if entitled to the possession under the contract, may defend his possession at law. It may be assumed that he cannot be deprived of his possession at law, if its continuation is not dependent upon his performance of the conditions of the contract under which he entered. Nor can he be amoved by ejectment, if he has performed the conditions of the contract by him to be performed, and is in a condition to demand a conveyance. In such a case it would seem that he may recover the possession at law, if ousted by the holder of the naked legal title." See further, on the right of the vendee to set up equitable defenses when sued in ejectment, *Hicks v. Lovell*, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942; *Cavalli v. Allen*, 57 N. Y. 508; *Stone Land Cattle Co. v. Boon*, 73 Tex. 548, 11 S. W. 544; *McCord v. Hames* (Tex. Civ. App.), 85 S. W. 504. He cannot base any equitable defense on a contract which he has failed to perform and does not offer to perform: *Howard v. Hewitt*, 139 Cal. 614, 73 Pac. 414.

c. **Improvements Made During Possession.**—The fact that a vendee, who has been put in possession under an executory contract of sale, makes valuable improvements on the property, does not entitle him to refuse to perform his agreement and yet retain possession: *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 271. When the vendor's suit is predicated upon the mere refusal of the vendee to pay the whole consideration contracted for, the fact that the vendee has paid part of the consideration and made valuable improvements, coupled with possession of the property, unaided by some other sufficient equity, will not entitle him to recover for such purchase money or improvements. In such cases, where the vendor has neither waived his legal rights nor committed any default, he cannot be involuntarily taxed with improvements made upon his property without his con-

sent, or be made to pay a price for recovering it back": *Moore v. Giesecke*, 76 Tex. 543, 13 S. W. 290; *Banks v. McQuatters* (Tex. Civ. App.), 57 S. W. 334. Where the vendee claims that the vendor cannot rescind without his consent because he has made payments and improvements, evidence is admissible to offset his claim that he cut and converted valuable timber from the land: *Walker v. Cole* (Tex. Civ. App.), 27 S. W. 882.

d. **Statute of Limitations.**—The fact that an action to recover the purchase money due is barred by the statute of limitations is no bar to an action by the vendor to recover property in the possession of the vendee, on the failure or refusal of the latter to comply with his contract of purchase. The question under the statute of limitations, in such a case, is whether or not the vendee has set up adverse possession and obtained a prescriptive title to the property. If he has not, it is no defense to an action for possession that the statute has run against the debt: *Kearns v. Dean*, 77 Cal. 555, 19 Pac. 817; *Dunlap v. Wright*, 11 Tex. 597, 62 Am. Dec. 506; *White v. Cole*, 87 Tex. 500, 29 S. W. 759; *Shotwell v. McCardell*, 19 Tex. Civ. App. 174, 47 S. W. 39; *Ellis v. Hannay* (Tex. Civ. App.), 64 S. W. 684.

FREED FURNITURE AND CARPET COMPANY v. SORESENSEN.

[28 Utah, 419, 79 Pac. 564.]

CONDITIONAL SALE Contracts are Valid not only as between the parties, but, in the absence of fraud, as to third persons, and they are not required to be recorded. (p. 735.)

CONDITIONAL SALE.—An Absolute Promise by a Vendee to Pay is not inconsistent with a conditional sale. (p. 737.)

A CONDITIONAL SALE is a Sale in which the transfer of title to the purchaser, or his retention of it, is made to depend upon the performance of some condition. (p. 739.)

CONDITIONAL SALE—Resale after Default.—If a contract for the sale of goods reserves the title in the seller until they are fully paid for, a provision that upon default by the buyer the seller may take possession of the goods, sell them, and, after applying the proceeds on the balance due, hold the residue, if any, subject to the disposal of the buyer, does not deprive the transaction of its character as a conditional sale. (p. 741.)

CONDITIONAL SALE—Renewal Notes.—Where contract notes given at the time of the delivery of goods evidence a conditional sale, the transaction is not converted into an absolute sale when the parties subsequently adjust their accounts, and a new note, similar to the original ones, is given to facilitate the keeping of the accounts, the old ones not being surrendered. (p. 741.)

COSTS—Apportionment.—In the Absence of Some Statutory provision authorizing it, costs in actions at law cannot be apportioned. (p. 742.)

COSTS—Apportionment in Replevin.—Where one section of the statutes provides that costs are allowed of course to the prevailing party, among others, in an action to recover the possession of personal property, and another section gives the court discretion to apportion costs in all other actions than those mentioned in the prior section, the court has no discretion to apportion costs when the plaintiff in an action for the possession of goods recovers only a portion of them, but must allow them as a matter of course to the prevailing party. (p. 743.)

Action by the Freed Furniture and Carpet Company, respondent, against P. A. Sorensen, appellant, for the possession of certain chattels or their value. There was judgment for the respondent for a part of the goods, and judgment for the appellant for part. The appeal is from the portion of the judgment in favor of the respondent.

The respondent and the appellant were both engaged in the furniture business, and at different times both sold household goods and furnishings to C. C. Fairchild. On January 11, 1901, the respondent delivered to Fairchild a part of the goods described in the complaint upon these terms and conditions:

“\$280.00. Salt Lake City, Utah, January 11, 1901.

“For value received, I, the subscriber residing at No. — Commercial street, in Salt Lake City, Utah, promise to pay to the Freed Furniture & Carpet Company, or order, the sum of two hundred and eighty dollars, payable in installments, as follows: The first payment of fifty dollars on the 12th day of January, 1901, and thereafter ten dollars on the — day of each succeeding week, till the amount of this note is paid in full, payable at the office of the Freed Furniture & Carpet Co., in Salt Lake City, Utah, with interest at the rate of one per cent per month after maturity, both before and after judgment, until fully paid. This note is given for the following described personal property this day sold to the maker hereof by the Freed Furniture & Carpet Co., to wit: [Here follows a description of the property.] And it is fully understood and agreed that the ownership, title and right of possession of the said property above mentioned, and for which this note is given, shall not pass from the said Freed Furniture & Carpet Co. until this is paid in full, and that should the maker hereof, at any time before this is paid in full, attempt to sell or otherwise dispose of said

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property, or to remove the same from the premises above noted as the residence of said maker, without the written consent of the holder of this note, or in case of default of any of the payments as above mentioned, then and in either case, the holder of this note shall have the right to declare this note due, and it shall then be lawful for the Freed Furniture & Carpet Co., or its agents, to take immediate possession of said property wherever found, and to sell the same at public or private sale, and without notice to the maker, and from the proceeds of such sale pay the balance then due on said note, together with all costs for the taking and selling of said property, holding the residue, if any there shall be, subject to the disposal of the maker thereof.

“C. C. FAIRCHILD.”

On February 25, 1901, and June 24, 1901, the respondent delivered to Fairchild a part of the goods described in the complaint, and on the last-named date they determined the amount then due, and a new note was given, conditioned as above, in which all the goods delivered under the prior agreements were specified, as well as some which Fairchild had previously bought from the respondent and paid for. On July 1, July 16, August 31, and November 14, 1901, the respondent again delivered goods to Fairchild, taking like notes therefor. On December 10, 1901, the amount due was again determined, and a new note executed as above for eighteen hundred and ninety-seven dollars, payable in installments, and specifying all the goods mentioned in previous agreements, including those previously bought and paid for as aforesaid. On May 5, 1902, the respondent delivered goods to Fairchild upon the same terms. November 17, 1902, they again adjusted and determined the amount due upon the transactions of December 10, 1901, and May 5, 1902, and this note was executed:

“\$1,772.20. Salt Lake City, Utah, Nov. 17, 1902.

“For value received, I, the undersigned, residing at No. 48 Commercial Street, in Salt Lake City, Utah, promise to pay to the Freed Furniture & Carpet Co., or order, the sum of seventeen hundred and seventy-two 20-100 dollars, payable in installments as follows: The first payment of twenty-five dollars on the 17th day of November, 1902, and thereafter twenty-five dollars on the —— day of each succeeding week until the amount of this note is paid in full, payable at the office of the Freed Furniture Co. in Salt Lake City,

Utah, with interest at the rate of one per cent per month from date, both before and after judgment, until fully paid, and agree to pay a reasonable attorney's fee, and all costs that may be incurred in any action or proceeding instituted for the collection of this note or the enforcement of this contract. This contract note is given for the following described personal property, to wit: [Here follows description of property.] The express condition of this transaction is such that the title to, ownership and right of possession of all of said property above described shall remain in and not pass from said Freed Furniture & Carpet Co. until this note and all the installments thereof, and interest thereon, have been paid in full; and should the maker thereof, at any time before this note is paid in full, attempt to sell or otherwise dispose of said property, or to remove the same from the premises above named and described as the residence of said maker, without the written consent of the said Freed Furniture & Carpet Co., or in case of default in making any of the payments above mentioned, or any interest thereon, or in case the Freed Furniture & Carpet Co. shall deem itself insecure even before maturity of this note, the Freed Furniture & Carpet Co. shall have the right to declare this note due and payable at once, and the said Freed Furniture & Carpet Co., or its agents, in such case has full power to take possession of said property wherever found. In case said property above described, or any part thereof, shall be so taken by said Freed Furniture and Carpet Co., it may, for the purpose of ascertaining the then value thereof, sell the same at public or private sale without notice; or may without sale indorse the then true value of said property, or the portion thereof taken, on this note; and the undersigned in either case agrees to pay on the note any balance due thereon, after such indorsement, as damages for the use of the property hereinbefore described.

C. C. FAIRCHILD."

Only partial payments were made on the notes or agreements, and they were not recorded. When the new notes were made, the original ones were not surrendered. Some time after the above-mentioned transactions, Fairchild executed to appellant Sorensen chattel mortgages on the goods above referred to, together with other goods, and these mortgages were recorded. Subsequently, on default of payment, the appellant, by virtue of the mortgages, took possession of the goods and caused them to be sold at public auction, and pur-

chased them at the sale. In the action by the respondent to recover the goods delivered by the respondent to Fairchild, the trial court decided that respondent could recover all of such goods except those which Fairchild had, before making the first note, bought and fully paid for. The goods so fully paid for were included in the renewal notes by mistake.

S. P. Armstrong, for the appellant.

Booth, Lee & Ritchie, for the respondent.

⁴²⁷ STRAUP, J. The correctness of the court's ruling must depend upon whether the note or agreement of January 11, 1901, and those subsequent thereto (except the one of November 17, 1902) are conditional sale contracts, or ⁴²⁸ whether they are absolute sales, with mortgage back for the purchase price; for the law is firmly established in this court that conditional sale contracts are valid, not only as between the parties to the contract, but also, in the absence of fraud, as to third parties, and do not fall within the chattel mortgage act: *Russell v. Harkness*, 4 Utah, 197, 7 Pac. 865, affirmed 118 U. S. 663, 7 Sup. Ct. Rep. 51, 30 L. ed. 285; *Shoshonetz v. Campbell*, 7 Utah, 46, 24 Pac. 672; *Hirsch v. Steele*, 10 Utah, 18, 36 Pac. 49; *Machine Works v. Parsons*, 10 Utah, 105, 37 Pac. 244; *Lippincott v. Rich*, 19 Utah, 140, 56 Pac. 806; 22 Utah, 196, 61 Pac. 526; *Detroit Heating Co. v. Stevens*, 16 Utah, 177, 52 Pac. 379; *Laundry v. Dole*, 22 Utah, 311, 61 Pac. 1103. It is conceded by appellant that under these authorities the contract of November 17, 1902, is a conditional sale contract. But he urges before that contract was made he obtained and had recorded a chattel mortgage on the property, and that his rights thereby became fixed before the making of it. The important inquiry therefore is whether the prior contracts, worded and conditioned as in the one of January 11th, and which were made at the time of the delivery of the goods, are conditional sales or absolute sales with mortgage back.

Appellant with much force says they are, in effect, mere chattel mortgages, which, to be valid as against third parties, must be executed and recorded as required by the chattel mortgage act. This is claimed principally because the vendee to the contracts unconditionally promised and obligated himself to pay the full purchase price, and because of the stipulation in the contracts permitting the vendor, in default

of payment, to take possession of the goods, sell them, apply the proceeds in payment of the balance due, and "holding the residue, if any there shall be, subject to disposal" of the vendee. It is claimed that these provisions so clearly evidence an intention of an absolute sale and passing of title, with mortgage back, that it is incompatible with the other stipulations in the contract of ⁴²⁹ retaining title, ownership, and right of possession of the goods in the vendor until fully paid. In support of these views he principally cites and relies upon *Andrews v. Colorado Sav. Bank*, 20 Colo. 316, 46 Am. St. Rep. 291, 36 Pac. 902, *Herryford v. Davis*, 102 U. S. 235, 26 L. ed. 160, *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. Rep. 60, 13 Pac. 858, *Hart v. Barney etc. Co. (C. C.)*, 7 Fed. 552, and *Straub v. Screven*, 19 S. C. 446. It is well to observe that the determination whether a sale is absolute or conditional depends primarily upon the intention of the parties, to be gathered from all the terms of the contract, the circumstances attending the transaction, and the conduct of the parties. This is to be determined not from any one or several stipulations in the contract disconnected from all others, and so construed as to render other portions of the contract nugatory, but it is to be determined by ascertaining the ruling intention of the parties, gathered from all the language they have used, and from a consideration of the whole contract, and, if possible, to give it such construction as will harmonize and give effect to all of its provisions. In the case of *Andrews v. Colorado Sav. Bank*, 20 Colo. 316, 46 Am. St. Rep. 291, 36 Pac. 902, it seems it was considered that an optional payment by the vendee of the purchase price is essential to constitute a conditional sale; and, where the purchaser has promised in unconditional terms to pay, it will render the transaction an absolute sale. This feature of a like contract was also considered in *Herryford v. Davis*, 102 U. S. 235, 26 L. ed. 160, and some importance attached to it. But we think this court is committed to a different doctrine: *Detroit Heating Co. v. Stevens*, 16 Utah, 178, 52 Pac. 379; *Machine Works v. Parsons*, 10 Utah, 105, 37 Pac. 244; *Lippincott v. Rich*, 19 Utah, 140, 56 Pac. 806; *Laundry v. Dole*, 22 Utah, 311, 61 Pac. 1103. In these cases the promise to pay was absolute, and in *Machine Works v. Parsons*, 10 Utah, 105, 37 Pac. 244, it also provided that the vendee "shall be liable for any balance" after applying the proceeds of sale upon the indebtedness. This holding is, we think, in

line with the great weight of authority. Certainly the supreme court of the United States ⁴³⁰ in *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, 30 L. ed. 285, where the promise to pay in the contract was absolute, by necessary implication also so held. The supreme court of California, in considering this feature of a conditional sale contract, observed: "It never has been held to be a determinative characteristic, and it cannot be so held without undoing all the law upon the question. There can be no sale at all without an agreement, express or implied, to pay. Lacking such a promise, the contract is a mere option. If the circumstance that the purchaser's promise to pay was absolute made the contract an absolute sale, the determination of the nature of such contracts would be so simple a matter as to have rendered entirely superfluous the vast amount of legal research and acumen that have been displayed by all the courts of this country and England in construing them. In truth the purchaser's promise is usually an absolute promise": *Van Allen v. Francis*, 123 Cal. 474, 56 Pac. 339, citing cases. We, therefore, hold that the absolute promise of the vendee to pay did not render the contract inconsistent with an intention of a conditional sale.

A more difficult proposition is presented by the stipulation in the contract requiring the vendor, in case of recaption and sale, and after applying the proceeds on the balance due on the note, to hold "the residue, if any there shall be, subject to the disposal" of the vendee. Considering the stipulation by itself, there is much force in the argument that it is characteristic of a chattel mortgage, and substantive of foreclosure proceedings. In *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. Rep. 60, 13 Pac. 858, it seems such a provision was considered a strong and characteristic feature of a chattel mortgage. But from a consideration of the late California cases we are inclined to the view that the effect of *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. Rep. 10, 13 Pac. 858, has been weakened, if not modified. In *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448, the court was again considering a like contract, and while, in some particulars, it differed from that in *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. Rep. 60, 13 Pac. 858, yet in the particular feature ⁴³¹ upon which the court in the latter case laid so much stress, characterizing it a mortgage, it was the same. In this particular the contract in *Rodgers v. Bachman*, 109 Cal. 552,

42 Pac. 558, provided, "If any moneys be left, then the same is to be paid to the said second parties" (vendees). Still the contract was held to be a conditional sale. And in *Perkins v. Mettler*, 126 Cal. 100, 58 Pac. 384, the court also says: "In the case last cited [*Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448] the contract held therein to be a conditional sale was similar in its terms to the contract herein considered. It contained the clause for a resale of the property on condition broken, and a return to the vendee of any amount obtained on such sale in excess of the amount due the vendor under the original contract of sale. . . . The court, in *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. Rep. 60, 13 Pac. 858, based the conclusion that the intention was to vest the substantial ownership in the vendee upon the clause in the contract providing for a resale on condition broken, and a return to the vendee of any surplus obtained on such resale; but the latter case of *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448, is an authority to the effect that such a stipulation is not absolutely determinative of the character of the contract." In *Heryford v. Davis*, 102 U. S. 235, 26 L. ed. 160, this feature of yielding over the surplus to the vendee was also pointed out, but it was not the controlling factor in reaching the decision holding the contract in that case an absolute sale. In the later case of *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, 30 L. ed. 285, where the contract was held to be a conditional sale and differing from the former contract in the particular, among others, that it contained no yielding over surplus clause, the court did not consider such fact a sufficiently distinguishing factor even to make any specific mention of it. The two cases were not distinguished because of this feature. We may therefore assume that, had such fact been thought a controlling, or even a prominent, factor in the contract, it would have been pointed out and mentioned as a distinguishing feature. While some of the cases cited by appellant have considered a yielding over surplus clause in such contracts characteristic⁴³² of a chattel mortgage, yet none, except it be *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. Rep. 60, 13 Pac. 858, has considered it a controlling or determinative feature. It will be observed that the contract here under consideration is very like the one in *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, 30 L. ed. 285, except here the residue, if any, is to be held subject to the disposal of the vendee; and there the

true value of the property, with or without sale, was to be indorsed upon the note, and the vendees agreed to pay any balance due thereon. In all other particulars the contracts, in substance, are the same. Now, while it may be said the paying over of the surplus to the vendee is consistent with and indicative of title in him, and in the other instance the obligation of the vendee to pay any balance due on the note is consistent with title in the vendor (which, however, may equally well be questioned), yet this difference, which is one only in legal effect, cannot, in this instance, when considered in connection with the whole contract, outweigh and overcome the other unmistakable terms and earmarks of a conditional sale. A conditional sale, in short, is a sale in which the transfer of title to the thing sold to the purchaser, or his retention of it, is made to depend upon the performance of some condition. Sales of personal property on condition that title is not to vest in the purchaser until the payment of the purchase money, or upon some other condition, are of very frequent occurrence. These elements are of the very groundwork of a conditional sale. The contract before us is evidence of such a sale. It contains express stipulations in clear and unambiguous terms that the ownership, title, and right of possession of the property shall not pass from respondent until the note is paid in full. Of course, if the real transaction, as gathered from the whole contract and from all the attending circumstances, disclosed the fact that the parties merely secured an indebtedness, and such was the ruling intention, then the mere form of the instrument, or the name the parties may have given it, is not to stand in the way of giving effect to such ruling ⁴³³ intention. But we find from the authorities that in determining this ruling intention as to whether the parties intended an absolute or conditional sale, much importance is attached to the stipulation in the contract retaining title until performance of condition, the very essence of a conditional sale: *Perkins v. Mettler*, 126 Cal. 100, 58 Pac. 384. In a contract of like kind, also providing for the payment of the balance to the vendee, and it being urged upon this and other grounds that the contract was but a chattel mortgage, the court said: "By the express terms of this agreement the title—that is, the general ownership—was to remain in the vendor until all the terms and conditions on the part of the vendee had been kept and performed. Having thus expressed themselves un-

ambiguously, we can see no reason why this court should strain after reasons for thwarting their obvious purpose": *Wilson v. Lewis*, 63 Neb. 617, 88 N. W. 690. Again: "The express agreement is that the vendee shall not acquire title until he has paid for the property in full, and this provision is not affected by another, in which it is agreed that he shall have any surplus which may arise in case of a sale by the vendor. This clause in the contracts is not inconsistent with the express agreement that title and right of possession shall remain in the vendor until the vendee shall have complied with the terms therein contained. . . . It is of no more or greater significance, when ascertaining the legal effect of the instruments, than is the other clause, in which the vendee agrees to pay any deficiency which may arise in case of a sale": *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115, 76 N. W. 1028.

The contract in the case of *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, 30 L. ed. 285, held to be a conditional sale, also contained a stipulation requiring the vendee to pay any deficiency after recaption and sale of the property. The Minnesota case just cited is an authority to the effect that the yielding over of the surplus to the vendee is of no greater significance when ascertaining the legal effect of the instrument, ⁴³⁴ than is the clause wherein the vendee agrees to pay any deficiency which may arise in case of sale. And in *American Harrow Co. v. Deyo*, 134 Mich. 639, 96 N. W. 1055, it was also held that the stipulation to pay the deficiency after applying the proceeds of sale on the indebtedness was not inconsistent with the one of title remaining in the vendor until payment of the purchase price. Again, it was said: "Both reason and authority tell us that there is nothing inconsistent in the provisions which declare that the title to the property shall remain with the vendor until payment has been made; and in case the vendor, for breach of contract, shall retake the property, he shall sell it, pay himself the balance of the debt, and pay over the balance of the proceeds to the vendee." The court then proceeds upon the theory that such clause was placed in the contract to guard against possible forfeitures of payments made, and "to create in favor of the purchaser a possible compensating advantage in the final disposition of the proceeds of the property. But this advantage was viewed by the contracting parties as springing not from the fact that the purchaser was the

holder of the title to the property, but as an offset to the harsh enforcement of the contract in possibly forfeiting all payments, and in a possible retention of the property without accounting for its value": *Herbert v. Rhodes-Burford Furniture Co.*, 106 Ill. App. 583. From some of the authorities it appears, and probably the prevailing doctrine is, on condition broken and recaption of property sold conditionally all payments made by the vendee are deemed forfeited, unless otherwise contracted. Other courts, acting on equitable principles, require the vendor who rescinds the contract for default after receiving partial payments of the price to refund the sum already paid, after deducting a reasonable compensation for the use of or damage to the property. It is not so much here whether the parties have stipulated in exact accordance with or contrary to these rules. But it is apparent to us, and we so conclude that by the latter ⁴³⁵ portion of the contract including the so-called surplus clause, the parties were not thereby stipulating concerning the passing or vesting of title, but thereby were stipulating and bargaining concerning the "compensating advantage" of the vendee in case of breach of condition and recaption of the property by the vendor, and to guard against the harsh rule of possible forfeitures if such should be held to be the true doctrine. So construing this portion of the contract, all of its provisions can be harmonized and be given effect. To construe it as is contended by appellant renders nugatory the provision providing for retention of title in the vendor until payments in full have been made.

It is also claimed, though the contract notes made at the time of the delivery of the goods evidenced an intention of a conditional sale, yet when the parties thereafter determined and adjusted their accounts, and a new note was made for what was then due, such transaction made it an absolute sale, with mere security for a debt. The contention is not sound. The new notes were worded and conditioned like the original or prior notes, and, as the evidence shows, were made only to facilitate the keeping of the accounts, and, as found by the court, none of the original or prior notes were surrendered or yielded up. If the original notes made at the time of the delivery of the goods evidenced a transaction of a conditional sale, how can it be said that a new note of exactly the same terms and conditions, and also evidencing only the same transaction,

shows an absolute sale, especially when the prior notes have not been surrendered or yielded up, and no agreement made to do so? If the original transactions were conditional sales, they could only be converted into absolute sales by some subsequent agreement as evidenced by the terms of some contract, or by some act or conduct of the parties. The mere taking of new contract notes worded and conditioned like the original, and merely evidencing the same transaction, is no evidence ⁴³⁶ of such fact. The trial court ruled correctly holding the contract notes in question conditional sales, and, as the condition upon which they were made had not been performed, title to the property sold and delivered by virtue thereof did not pass to Fairchild, and therefore his mortgage to appellant on such property is as to respondent, of no effect.

The remaining question is that of costs. Inasmuch as judgment was for respondent for part of the property sued for and part for appellant, the court in the exercise of discretion, directed that each party pay his own costs. Appellant contends the judgment in this particular ought to have been that each party be entitled to costs. In the absence of some statutory provision authorizing it, costs in actions at law cannot be apportioned: 11 Cyc. 28. Section 3339 of the Revised Statutes of 1898 provides that costs are allowed of course to the prevailing party among others, in an action to recover the possession of personal property. Section 3341 gives the court discretion to apportion costs in all other actions than those mentioned in the section above. We are of the opinion that in actions of this kind the court is not given discretion to apportion, but must allow costs as matter of course to the prevailing party: *Miller v. Zeigler*, 3 Utah, 17, 5 Pac. 518; *Dudley v. Facer*, 8 Utah, 403, 32 Pac. 668; *Phipps v. Taylor*, 15 Or. 484, 16 Pac. 171; *Dresher v. Corson*, 23 Kan. 313; *Lanyon v. Woodward*, 65 Wis. 543, 27 N. W. 337; *Rohr v. McCaig*, 33 Cal. 309; 11 Cyc. 28. In such cases authorities somewhat differ in regard to the rule awarding costs, but this is mostly due to different statutory provisions. Under our statute we think the correct rule is, in action for the recovery of personal property, where possession was not taken by plaintiff prior to judgment, though he recovers judgment for only part of the property sued for, he nevertheless is the pre-

vailing party, and it is entitled to all his costs as matter of course, and defendant is entitled to no costs. Where, however, plaintiff takes the property from the possession of the defendant, ⁴³⁷ and has judgment only for part, and defendant for part, then in such case both parties are entitled to costs as matter of course; for in such case defendant has been wrongfully deprived of the possession of property rightfully his, and to that extent, and in justifying and demanding it back, he is an actor and a plaintiff (Rev. Stats. 1898, sec. 3165), and, succeeding therein, is a prevailing party. It does not follow, however, that defendant in such case may tax costs merely incurred in his unsuccessful defense of withholding the property awarded to plaintiff by the judgment. He can only tax costs properly and necessarily incurred with respect to the property awarded to him by the judgment. And the same is true in regard to the plaintiff. And if either should tax costs not properly and necessarily so incurred, on motion made such items should be stricken from the cost bill. It may be that in the exercise of discretion the court can do better justice between the parties by refusing costs to both, or by otherwise apportioning them; but that is matter of legislation. This judgment cannot be reversed, however, because of its discretion as to the payment of costs. Appellant filed his costs bill amounting to twenty-six dollars. Respondent filed none, presumably because of the direction of the court that each party pay his own costs. If appellant were prejudiced by this direction, we could direct that the judgment be modified allowing him his costs. But it is apparent to us that he is not prejudiced. While the taxable costs of respondent are not made to appear with any degree of certainty, yet sufficient does appear from the face of the record, by way of clerks', sheriffs' and witness fees, at the minimum, to overcome appellant's costs. He was therefore benefited, rather than harmed, by the judgment directing each party to pay his own costs, instead of directing that each be allowed costs: *Dresher v. Corson*, 23 Kan. 313; *Lanyon v. Woodward*, 65 Wis. 543, 27 S. W. 337.

The judgment of the lower court is affirmed, with costs of appeal awarded to respondent.

Bartch, C. J., and McCarty, J., concur.

The Seller of Goods may, by appropriate contract, retain the title thereto until the performance of some condition on the part of the buyer: *Vermont Marble Co. v. Brow*, 109 Cal. 236, 50 Am. St. Rep. 37; *Triplett v. Mansur*, 68 Ark. 230, 82 Am. St. Rep. 284. See, generally, on what constitutes a conditional sale, the notes to *Andrews v. Colorado Sav. Bank*, 46 Am. St. Rep. 295; *Palmer v. Howard*, 1 Am. St. Rep. 63. It is said in *Andrews v. Colorado Sav. Bank*, 20 Colo. 313, 46 Am. St. Rep. 291, that the optional payment of the purchase price is as essential to constitute a transaction a conditional sale as the conditional passing of the title. Conditional sales are distinguished from chattel mortgages in the monographic note to *Fleet v. Hertz*, 94 Am. St. Rep. 234.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

GOODELL v. TOWER.

[77 Vt. 61, 58 Atl. 790.]

FALSE IMPRISONMENT—Arrest—Warrant Without Jurisdiction—Personal Liability of Magistrate.—If a justice of the peace or other inferior magistrate acts without his jurisdiction in issuing a warrant of arrest to the injury of the person arrested thereunder, the magistrate is personally liable for false imprisonment. (p. 746.)

FALSE IMPRISONMENT—Arrest.—It is not necessary to an arrest, to support an action for false imprisonment, that the officer should lay hands upon the person arrested, as it is sufficient if he was within the power of the officer and submitted to the arrest. (p. 747.)

FALSE IMPRISONMENT.—Every restraint upon a man's liberty is, in the eye of the law, an imprisonment and if not justifiable is false imprisonment. (p. 747.)

ARREST.—To constitute an arrest there must be some real or pretended legal authority for taking the person into custody and he must be restrained of his liberty; but if he submits and is within the power of the officer, that is sufficient without an actual touching of his person. (p. 747.)

ARREST—Process—Justification.—In criminal proceedings the complaint and warrant constitute the precept, and when the complaint shows on its face that the justice of the peace who signed the warrant of arrest had no authority to issue it, the officer who served it cannot justify thereunder. (pp. 747, 748.)

FALSE IMPRISONMENT—Arrest under Void Process.—An officer is liable for false imprisonment when the process under which the arrest and imprisonment are made is absolutely void for want of jurisdiction in the magistrate issuing it, or for other cause. (p. 748.)

FALSE IMPRISONMENT.—All Persons Aiding and Assisting in the unlawful confinement of another are liable in damages for the false imprisonment, although they had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful at the time they had a hand in it. (p. 748.)

FALSE IMPRISONMENT.—Any person who aids or abets an unlawful arrest is liable for a false imprisonment. (p. 748.)

FALSE IMPRISONMENT—Damages.—A person suing for a false imprisonment is entitled to compensation for loss of time, and for mental suffering without special allegation. (p. 749.)

W. W. Stickney, J. G. Sargent and H. L. Skeels, for the plaintiff.

Butler & Maloney, for the defendants.

⁶³ TYLER, J. This action is trespass for false imprisonment. The question arises upon the complaint upon which the warrant was issued.

Vermont Statutes, 5001, reads: "Sheriffs, deputy sheriffs, constables, police officers, other prosecuting officers and all officers of societies for the prevention of cruelty to animals shall prosecute violations of the preceding sections of this chapter which come to their notice or knowledge."

⁶⁴ The complaint was made by William W. Tower, who described himself therein as "officer or agent of the Society for the Prevention of Cruelty to Animals within and for the county of Rutland," and signed it, "William W. Tower, agent," and thereupon the justice issued the warrant. It could not be maintained, and it is not insisted that Tower had authority under the statute to make the complaint as agent, therefore we are not called upon to decide whether a legally organized society of this kind might confer authority upon a certain officer to make complaint for a violation of this statute. That question does not arise.

1. As Tower had no legal authority to make the complaint, it follows that the justice had no jurisdiction of the subject matter and no authority to issue the warrant. And it is the law in England and in this country that where a justice of the peace or other inferior magistrate acts without his jurisdiction in issuing a warrant, to the injury of another person, the magistrate is personally liable: 2 Am. & Eng. Ency. of Law, 897, and cases cited; Morrill v. Thurston, 46 Vt. 732; Carleton v. Taylor, 50 Vt. 227; Vaughn v. Congdon, 56 Vt. 111, 48 Am. Rep. 762. The rule is again recognized in Banister v. Wakeman, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201.

2. It is contended in defendant Hastings' behalf that he did not restrain the plaintiff of his liberty. The trial court found that, having the complaint and warrant signed respectively by the other two defendants, he met the plaintiff and stopped him by speaking to him as he was driving along on a business errand, read the paper to him and told him he would have to go with him, Hastings; that the plain-

tiff told the officer that he would have to get some one to take his team; that the officer permitted him to do his errand, but directed him to return as soon as he could; that the plaintiff then drove ⁶⁵ along; that Hastings became impatient, and went to meet him, turned in behind the plaintiff's team and followed him to the village; that he went to the place of trial with the plaintiff, delivered the paper to the justice and informed him that the plaintiff was present; that this was all that Hastings did besides making his return upon the warrant; that he understood that the plaintiff was in his custody.

The action of the officer constituted a false imprisonment of the plaintiff. It was not necessary that he should lay his hands upon him. It was sufficient that the plaintiff was within his power and submitted to the arrest: *Mowry v. Chase*, 100 Mass. 79. Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place or whatever may be the manner in which the restraint is effected: 2 Kent's Commentaries, 26. And see *Pike v. Hanson*, 9 N. H. 491, cited in the notes, where it was held that words may constitute an imprisonment, if they impose a restraint upon the person, and he is accordingly restrained and submits. The law is so well settled upon this subject that it is hardly necessary to cite authorities, but the notes in *Bissell v. Gold*, 1 Wend. 210, 19 Am. Dec. 480, are interesting and clearly elucidate the rule that to constitute an arrest there must be some real or pretended legal authority for taking the party into custody; that he must be restrained of his liberty; that if he submits and is within the power of the officer it is sufficient without an actual touching of his person. This is the rule laid down by Savage, C. J., in the main case, and it has not been departed from in recent authorities.

3. Defendant Hastings contends that it was within the jurisdiction of the justice to issue such a warrant, that the justice instructed him to serve it, and as it appeared to be in proper form, he was justified in making the arrest. But the ⁶⁶ complaint and warrant constituted the precept, and the complaint being signed by Tower as agent, it was apparent upon its face that the justice had no authority to issue the warrant: *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11. The case does not fall within

the rule that an officer is justified for his actions within the scope of the command of a process appearing on its face to have been regularly issued, as was held in *Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487. The justice had no more authority to issue a warrant upon this complaint than he would have had if the complaint had not been signed at all, and it is well settled that while an officer may justify an arrest upon a process that is voidable only, he is liable for false imprisonment when the process is absolutely void for want of jurisdiction in the justice or for other cause: *Boeger v. Langenberg*, 10 Am. St. Rep. 322, and notes; *Mitchell v. State*, 54 Am. Dec. 253, and notes. There is also a full discussion of this subject in the opinion and notes in *Savacool v. Boughton*, 21 Am. Dec. 181, and in 12 American and English Encyclopedia of Law, 744. This rule was recognized by this court in *Churchill v. Churchill*, 12 Vt. 661, and in *Tenny v. Smith*, 63 Vt. 520, 22 Atl. 659.

4. Upon the authorities all the defendants are liable. It is laid down in 2 Addison on Torts, 41, that: "All persons aiding and assisting in the unlawful confinement of another are responsible in damages for the trespass, although they had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful at the time they had a hand in it." In the notes this author says that a person who aids or abets an unlawful arrest is liable for false imprisonment. It was held in *Bissell v. Gold*, 1 Wend. 210, 19 Am. Dec. 480, that all persons who are concerned in an illegal arrest are trespassers. In 12 American and English Encyclopedia of Law, 751, the rule is stated and supported ⁶⁷ by many authorities cited in the notes that: "A person who causes, instigates and procures an unlawful imprisonment is liable in damages therefor. Although, it has been held the defendant himself did not in person impose the restraint upon the plaintiff, if he is the moving cause of the imprisonment he will be held responsible for it." *Von Kettler v. Johnson*, 57 Ill. 109, cited by plaintiff is an authority upon this point.

The case shows that the plaintiff was tried by a jury in the justice's court, convicted and fined, and that he appealed the case to the county court, where it was finally dismissed.

5. We are unable to find from the record that all the damages found for the plaintiff in the trial court were not the natural and proximate result of the defendants' wrongful acts. The plaintiff was entitled to compensation for loss of time, and for mental suffering without a special allegation.

Judgment affirmed.

For Authorities in Support of the Principal Case, see the monographic note to Tryon v. Pingree, 67 Am. St. Rep. 413, on false imprisonment. Consult, also, the subsequent cases of State v. McDaniel, 78 Miss. 1, 84 Am. St. Rep. 618; Oates v. Bullock, 136 Ala. 537, 96 Am. St. Rep. 38.

HUBBARD v. HUBBARD.

[77 Vt. 73, 58 Atl. 969.]

CONSTITUTIONAL LAW—Conveyance by Wife Alone.—A statute authorizing a court of chancery in its discretion on a wife's petition to empower her to convey land by her separate deed, is unconstitutional as an attempt to deprive a husband of his property without due process of law, and without making the exercise of the power depend upon proof of any prescribed facts. (p. 754.)

W. H. Bliss, for the petitioner.

W. H. Davis, for the respondent.

⁷⁴ STAFFORD, J. The question is whether No. 49 of the Acts of 1896 is constitutional. It provides that "the court of chancery, in its discretion, upon the petition of a married woman, may empower her to convey her real estate by separate deed" as effectually as if the deed were executed by herself and her husband.

In the present case the petition set forth the marriage of the petitioner to the petitionee, that the petitioner was then the owner in fee simple of a piece of land described, that ⁷⁵ since her marriage she had bargained the land to a party named and needed the proceeds for her support and to meet her obligations, and thereupon prayed for authority under said act. These, so far as the case shows, were the only averments in the bill. There was an answer, but there is nothing before us to show what it contained. The cause was referred to a special master to hear and de-

termine the issues of fact; and the master having heard the testimony made his report to the court of chancery. The printed case purports to give the substance of the findings, as well as certain concessions, from which it appears that the parties were married in 1899, that the petitioner then owned the land described in the petition, holding the same by ordinary conveyance and not to her sole and separate use; that the parties lived together for about a year and since that period have lived apart in the circumstances and for the reasons stated by the master, which need not be noticed further than to say that they seem to show a case of separation begun and continued through the fault of the husband; that the property, free of encumbrances, is worth about nine hundred dollars (\$900); that the husband brought a petition for divorce which was dismissed, and that the wife brought one which was discontinued; that she bargained the land and that the petitionee refused to join in the deed. The cause was heard in the court of chancery upon the report and the petitionee's exceptions thereto—what the exceptions were does not appear—and a decree was entered empowering the petitioner to convey the real estate by her separate deed "pursuant to the provisions of No. 49 of the acts of 1896," from which decree this appeal was taken. It will be observed that the petition is brought and the decree rendered strictly under and pursuant to the act in question. The petition does not attempt to make a case under the provisions of Vermont Statutes, ⁷⁶ 2650, nor does the court of chancery treat the case as arising thereunder. That statute provides that when a married man is incapacitated by intemperance, insanity or otherwise for supporting his family, or deserts, neglects, or abandons his wife, or by ill-usage or criminal conduct gives her cause to live apart from him, the chancellor may, upon her petition, if she is of full age, authorize her to sell and convey her real estate or any personal estate which came to the husband by reason of the marriage. How the case might have stood under that enactment, we have, for the reason stated, no occasion to inquire. Even in this court the petitioner's counsel does not rely upon or even refer to that provision.

If the decree is valid what is its effect? We are still living under the common-law rule which gives the husband

a freehold estate for the joint lives of himself and his wife in her lands which she held at the time of her marriage except such as she held to her sole and separate use. In this land, therefore, the petitionee has such a freehold interest. In that sense and to that extent it is his estate. He is entitled to the rents and profits thereof: *Dietrich v. Hutchinson*, 73 Vt. 134, 50 Atl. 810; *Hackett v. Moxly*, 68 Vt. 210, 34 Atl. 949; *Chapman v. Long*, 66 Vt. 656, 30 Atl. 3.

Such estate is still recognized and protected by statute, for the wife may not convey nor mortgage her real estate except by deed duly executed by herself and her husband: Vt. Stats., 2646. The effect of the decree, then, is to deprive the husband of his estate. This of course cannot be done without due process of law: U. S. Const., 14th Amend., sec. 1. Does the act in question provide or contemplate due process of law? It declares that the husband's estate may, in effect, be taken from him and bestowed upon the wife, upon her petition, by the court of chancery "in its discretion." Legitimate judicial⁷⁷ discretion is, without doubt, due process of law. Consequently, the exact question is whether the power attempted to be vested in the court of chancery is a permissible instance of judicial discretion. Many attempts have been made to define the term and there is no harmonizing the results: See 6 Ency. of Pl. & Pr. 819, tit. "Discretion"; 2 Ency. of Pl. & Pr., pp. 409-420, tit. "Appeals"; and 9 Am. & Eng. Ency. of Law, p. 473. One court treats it as nothing more than the power to determine finally and without appeal upon the question of fact, treating the legal rule as settled and binding: *Bundy v. Hyde*, 50 N. H. 120. Another declares that it can have no meaning whatever unless it extends to the determining of the rule of law itself and be recognized as final and conclusive in that respect also: *Judges v. People*, 18 Wend. 99. Others treat it as a freedom to determine both the rule and the fact within certain bounds, which bounds are inviolable, and are not to be overpassed without redress. All agree that by judicial discretion is never intended the whim or caprice of the magistrate, nor a course of judicial action inconsistent with itself in dealing with cases essentially alike. It is the essence of all law that when the facts are the same the re-

sult is the same. It is always necessary in the decision of a matter in court that the judge should have in mind first a rule or standard, and second the facts which are to be tested thereby. But certain matters seem hardly to admit of the formulation of inflexible rules in advance and to be most wisely left to the sound judgment of the magistrate when the exigency shall arise, leaving him to be governed by the general analogies of the law and his own sense of justice. The better view seems to be that even in these instances he is not altogether a law unto himself, but may be overruled if his action is such as to shock the universal, or the common, sense of what is right ⁷⁸ among his fellows. All judicial discretion may thus be considered as exercisable only within the bounds of reason and justice in the broader sense, and to be abused when it plainly overpasses these bounds: See an article entitled "Judicial Discretion," 17 Am. Law Rev. 569; Sir John Romilly's opinion, 17 Eng. Rul. Cas. 823; *Gardner v. Jay*, 29 Ch. D. 52, 54 L. J. Ch. 729, 52 L. T. 395, 33 Week. Rep. 470, 3 Eng. Rul. Cas. 251, 252. The deposit of discretion is most usually found in matters of procedure and the conduct of trials, where not only would it be difficult to prescribe exact and minute regulations, but where the situation itself is not easily reproduced in its original character, and cannot safely be reviewed. Such are questions concerning the latitude of cross-examination, the course of argument, within certain bounds, questions of continuance and frequently of new trials, questions of the right to amend or withdraw pleadings, whether actions should be consolidated, whether and when election between counts should be compelled, questions of contempt in the presence of the court, and the like. Instances are not wanting, however, in the field of substantive law. Whether specific performance shall be decreed is said to be a matter of discretion, but the rules governing the exercise of the discretion have become so well fixed and understood that the conditions determining the right to a decree are almost capable of being stated in the form of a rule: 3 Pomeroy's Equity Jurisprudence, sec. 1404; *Fowler v. Sands*, 73 Vt. 237, 50 Atl. 1067. We are not aware of any instance where the law has attempted to subject the right of a person to retain his estate to the decision of a magistrate unguided and unregulated save

by his own sense of fairness and justice. The grant of discretionary power in the legal sense apparently implies the existence of certain well-understood principles within which it should be exercised. But when a statute declares that a husband's ⁷⁹ property may be taken from him and bestowed upon his wife in the discretion of the chancellor, what are the well-understood principles which are to govern him in the exercise of his discretion? In the statute referred to above (Vt. Stats. 2650) the legislature undertook to lay down the law upon that very subject, carefully defining the circumstances in which a wife might be given the authority now asked for. When the chancellor is bidden to exercise his discretion beyond and regardless of these circumstances, how is he to judge? He has no law to govern him because the law is against divesting the husband of his estate. Is he to make a law? Is he to formulate a rule governing such cases? Then he becomes the legislature for that case. And is one chancellor to make one rule and another chancellor a different rule? Then we live under a government of men, not laws. Is it a case for the exercise of discretion, or is it not rather a field wherein the rights of men and women must be regulated by positive law? Is it not too much to ask that one's right to hold his estate should be made to depend upon its appearing fair and just to a chancellor that he should do so, merely in view of the circumstances existing between himself and another?

Analogous cases are to be found. A statute attempting to give the judge in criminal trials authority to keep the jury together or permit them to disperse, in his discretion, has been held void: *King v. Tennessee*, 87 Tenn. 304, 3 L. R. A. 210. An ordinance forbidding the use, upon certain streets, of heavy vehicles without the special permission of a board, was held unreasonable and void as failing to prescribe conditions upon which the permission should be granted and leaving it to the arbitrary will of the officers: *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 26, 68 Am. St. Rep. 155, 51 N. E. 758, 42 L. R. A. 696. Similar cases are: *City of Plymouth v. Schultheis*, 135 Ind. 339, 35 N. E. 12; *Mayor v. Radecke*, 49 Md. 217, 33 ⁸⁰ Am. Rep. 243; *Noel v. People*, 187 Ill. 587, 79 Am. St. Rep. 238, 58 N. E. 616, 52 L. R. A. 287; *In re Wo Lee*, 26 Fed. 471; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 14 L. ed. 832.

In our opinion, to take one's property under a statute like the present is to deprive him thereof without due process of law, and accordingly we hold that acts of 1896, No. 49, is unconstitutional and void in that it undertakes to clothe a court with power to deprive a property owner of his estate without making the exercise of the power to depend upon proof of any prescribed facts, but leaving it to the arbitrary and unregulated will of the magistrate.

Decree reversed with costs in this court, and cause remanded with mandate that the bill be dismissed.

For Authorities Bearing upon the Principal Case, see Parish v. East Coast Cedar Co., 133 N. C. 478, 98 Am. St. Rep. 718; Cunniss v. Reading School Dist., 206 Pa. St. 469, 98 Am. St. Rep. 790; State v. Westfall, 85 Minn. 437, 89 Am. St. Rep. 571; monographic note to McClymond v. Noble, 87 Am. St. Rep. 358-368; Clapp v. Hong, 12 N. Dak. 600.

WHITE RIVER SAVINGS BANK v. CAPITAL SAVINGS BANK AND TRUST COMPANY.

[77 Vt. 123, 59 Atl. 197.]

CORPORATIONS—Transfer of Stock—Duty to Record.—Although a corporation charter provides that its stock shall be transferred only upon its books, and that no transfer shall be valid until the assignor shall have paid all debts due from him to the corporation, yet the corporation cannot refuse to record a transfer of stock when it has notice thereof before the assignor becomes indebted to it. (p. 757.)

CORPORATIONS—Stock—Transfer as Collateral—Title of Holder Before Registry.—The holder of a certificate of stock in a corporation assigned to him as collateral security by indorsement with power of attorney in blank to make transfer on the corporation books has the equitable interest and legal title of the assignor, though as against the corporation, bona fide purchasers, and creditors of the assignor, unaffected with notice, the transaction is incomplete until the transfer is actually made on the books of the corporation. (pp. 757, 758.)

CORPORATIONS—Transfers of Stock—Actual Notice.—The record of a transfer of stock on the books of the corporation is required for notice merely, and anyone having actual notice of such transaction and transfer can stand in no better relation to it than he would if it were completed of record. (p. 758.)

CORPORATIONS—Pledge of Stock—Property in.—If the legal title to corporate stock is transferred to a pledgee as collateral security, he takes only a special property therein; and the general property remains in the pledgor, which gives the corporation a lien there-

on for money advanced to him after notice of the pledge, subject to the lien of the latter. (p. 758.)

APPEAL—Review of Questions Raised by Overruled Demurrer. If a demurrer to a bill in equity is overruled and a hearing is subsequently had upon an agreed statement of facts and a decree rendered pro forma dismissing the bill, from which decree an appeal is taken, the benefit of the demurrer is impliedly reserved to the defendant until the hearing and the questions raised thereby are properly reviewable on appeal. (p. 759.)

PLEDGES—Remedies of Pledgee.—In addition to proceeding personally against the pledgor for his debt without selling his pledge, the pledgee has his election of two remedies upon the pledge itself. He may file a bill in the nature of a foreclosure suit and proceed to a judicial sale, or he may sell without judicial process upon giving reasonable notice to the pledgor to redeem and of the intended sale. (p. 759.)

CORPORATIONS—Pledge of Stock as Collateral Security—Remedy of Pledgee.—When neither the time of redemption nor the manner and time of sale are specified in a contract pledging corporate stock as collateral security, and the corporation issuing the stock claims a prior lien thereon, the pledgee may maintain a bill in equity against the corporation to enforce the pledge. (p. 759.)

PLEDGES—Failure of Pledgor to Redeem.—The pledgee of goods does not acquire an absolute title thereto by the failure of the pledgor to pay the debt or redeem the property at the time limited. His only interest is a special property to retain the goods for his security. (p. 760.)

PLEDGES—Enforcement of Security.—The pledgee may enforce his security and cut off the pledgor's right to redeem by a lawful sale of the pledge, and whenever the purpose of the pledge is satisfied, the right to the surplus, if any, is in the pledgor or some one having an interest in the general property under him. (p. 760.)

PLEDGES—Length of Time for Redemption.—If no time of redemption is limited by the contract of pledge, the legal right to redeem is in the pledgor during his life, unless the pledgee, in the meantime, calls upon him to redeem, and if the pledgor die without such call, the right to redeem descends to his personal representatives. (p. 760.)

CORPORATIONS—Pledge of Stock—Statute of Limitations.—If a corporation has actual notice from a pledgee that a specific part of its stock is pledged him as collateral security, the statute of limitations does not run in favor of the corporation, as to a subsequently acquired lien, as against the pledgee's right to enforce the pledge. (p. 760.)

CORPORATIONS—Pledge of Stock—Laches in Enforcing.—If a corporation's lien on certain of its stock attaches within less than three years and one-half, after it has received notice of the pledge of such stock, and it is not claimed that the pledgee, after notice of the corporation's equities, has ever done anything to its prejudice, the pledgee is not barred by laches from enforcing the pledge. (pp. 760, 761.)

CORPORATIONS—Transfer of Stock.—Unpaid Dividends accruing after demand made for the transfer of stock upon the books of a corporation are an incident to the stock and follow it. (p. 761.)

PLEDGES—Foreclosure—Parties.—Although the pledgor is generally a necessary party to a suit in equity to enforce the pledge,

yet when the pledgee files the written consent of the pledgor that the stock may be sold under judicial decree, and the proceeds applied first to the payment of the pledgee, and the remainder to the payment of a subsequently acquired lien of a third party, the necessity of making the pledgor a party is dispensed with. (p. 761.)

Hunton & Stickney, for the plaintiffs.

T. J. Deavitt and E. H. Deavitt, for the defendant.

¹²⁶ WATSON, J. The defendant is a corporation organized and doing business under a special charter, No. 99, Acts of 1890. The par value of its capital stock is one hundred dollars per share. The intrinsic value does not appear. Before and on August 22, 1895, one Charles P. Tarbell held certificate No. 75 issued to him for ten shares of this stock for which he had fully paid. On the day last named, the orator was the holder and owner of an overdue promissory note signed by Tarbell and others, by which they severally, each as principal, promised to pay to the order of the orator two thousand five hundred dollars on demand with interest semi-annually; and as collateral security for the payment of this note, Tarbell, on the same day, transferred to the orator the said ten shares of stock by an indorsement on the certificate, which indorsement also contained in blank a power of attorney to make a transfer upon the company's books. At the time of this transfer, the orator notified the defendant by letter that the orator held the said certificate of stock as collateral security to a loan made by it. Tarbell was not then indebted nor under any liability to the defendant, but subsequently, on March 10, 1899, he executed and delivered to the defendant his promissory note for six hundred dollars for money then advanced to him by the defendant, payable on demand with interest semi-annually. This note has hitherto been owned by the defendant, and is now with some interest thereon unpaid. Defendant holds some collateral security for the payment of the note, but it is of little or no value.

The orator's note was reduced to a judgment at the June term, 1902. Upon that judgment a small payment has been made by one of the other signers of the note, and other collateral ¹²⁷ security held by the orator has been applied, leaving a balance of more than a thousand dollars still unpaid.

The certificate of stock with transfer thereon was never presented by the orator to the defendant for transfer on its books until December 30, 1902. Prior to that time, the divi-

dends on the stock had been paid to Tarbell without any knowledge of the orator or objection by it.

On December 30, 1902, the orator presented the certificate with transfer thereon to the defendant, and requested it to transfer said stock upon its books to the orator and to issue to the orator a certificate therefor. The defendant refused to comply with this request for the alleged reason that such transfer could not be made until the debt due from Tarbell to the defendant was paid, claiming a lien on the stock under section 7 of its charter, which reads: "The shares of such corporation shall be transferred only in such manner and under such regulations as shall be prescribed by the by-laws thereof; provided, no transfer shall be valid until recorded by the cashier or treasurer, or in his absence by one of the trustees, in a book for that purpose, nor until the person making the same shall have previously discharged all debts and liabilities due from him to said corporation."

Nothing in this section gives the corporation any right to refuse to transfer stock on the records before the owner thereof becomes indebted or liable to it. Until then, the owner may sell his shares of stock, or transfer them as security in any way he chooses, provided he makes such delivery as the law requires. The statute provides that a transfer, by assignment and delivery, of a certificate of stock as collateral security, is a valid transfer of the shares of stock represented by the certificate, when made to secure a valid debt or obligation, as against the party so transferring the ¹²⁸ same, his heirs, executors, administrators, and assigns: Vt. Stats., 3689. The orator holds the certificate of stock as security by such a transfer, with power to make a transfer upon the books of the corporation. Under the holdings of this court, this gives the orator the equitable interest and legal right of the assignor in the stock represented by the certificate, although as against the corporation, bona fide purchasers, and creditors of the assignor, unaffected with notice, the transaction is incomplete. Yet as a record on the books of the company is required, not as an essential to pass title between the parties, but merely for notice, anyone having actual notice of the transaction can stand in no better relation to it than one would had it been completed of record: Cheever v. Meyer, 52 Vt. 66; Sabin v. Bank of Woodstock, 21 Vt. 353; Noyes v. Spaulding, 27 Vt. 420.

Consequently, when the defendant received notice from the orator that it held the certificate of stock in question as collateral security, the defendant was bound to respect the rights of the orator as pledgee of the stock: *People's Bank v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269; *Bank of America v. McNeil*, 10 Bush, 54; *Nesmith v. Washington Bank*, 6 Pick. 324; *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29, 56 L. J. Ch. 364, 56 L. T. 62, 35 Week. Rep. 521. By the pledge, however, the orator took only a special property; the general property remained in the pledgor: *Samson v. Rouse*, 72 Vt. 422, 48 Atl. 666. Nor in this respect does the fact that as between the parties to the pledge, the legal title to the stock was transferred to the pledgee make any difference; for such transfer was in law equivalent to the delivery of possession in case of a pledge of corporeal property: *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237. Hence for any credit extended ¹²⁰ to the pledgor after notice of the pledge, the defendant can have a charter lien on only the pledgor's general interest in the property subject to the lien of the pledge which it, as well as the pledgor, is entitled to redeem.

It is argued, however, that the notice received by the defendant is not sufficient to supply the requisites of a valid transfer prescribed by the act of incorporation. The treasurer of the orator sent by mail a letter to the defendant notifying it that the orator held as collateral security to a loan made by it, certificate of stock No. 75 for ten shares of the capital stock in the defendant company, issued to Charles P. Tarbell. This letter was received by the treasurer of the defendant company. In the giving of this notice on the one hand and in receiving it on the other, the respective treasurers were in the performance of their official duties. In legal effect the notice was from the orator to the defendant. If the notice in itself was not sufficiently full, the defendant was certainly thereby put upon inquiry, and it is chargeable with knowledge of the orator's equitable interest, for by proper inquiry the defendant would have ascertained it.

In its answer, the defendant demurred to the bill for want of equity, and a hearing was had thereon. The demurrer was overruled, whereupon a hearing was had upon an agreed statement of facts and a decree rendered pro forma dismiss-

ing the bill. The case is here on the orator's appeal. The defendant now seeks to take advantage of the questions raised by the demurrer. It is urged by the orator that, as no appeal was taken to the decree overruling the demurrer, no question raised by it is before this court. But under our present practice, we think the benefit of the demurrer was impliedly reserved to the defendant until the hearing, and that questions raised thereby are properly here: *Town of Westminster v. Willard*, 65 Vt. 266, 26 Atl. 952.

¹³⁰ With the defendant's contention upon the demurrer, however, that the case presented is not properly cognizable in a court of equity, we cannot agree. The law is well settled that in addition to proceeding personally against the pledgor for his debt without selling his pledge, the pledgee has his election of two remedies upon the pledge itself. That he may file a bill in chancery in the nature of a foreclosure bill and proceed to a judicial sale, or he may sell without judicial process upon giving reasonable notice to the pledgor to redeem and of the intended sale: *Taggart v. Packard*, 39 Vt. 628; *Bishop's Equity*, sec. 359; 2 *Kent's Commentaries*, 11th ed., *582; 2 *Story's Equity Jurisprudence*, sec. 1033; 3 *Pomeroy's Equity Jurisprudence*, sec. 1412; *Carter v. Wake*, L. R. 4 Ch. D. 605, 46 L. J. Ch. 841; *Vanpell v. Woodward*, 2 Sand. Ch. 143. And proceedings in equity are peculiarly appropriate where, as in this case, neither the time of redemption nor the manner and time of sale are specified in the contract, and the pledgee's rights or powers are being questioned or denied by the corporation which issued the stock pledged, itself claiming a priority of lien thereon. In a court of equity, the pledgee's trust can be made available with proper regard for the rights of all concerned: *Boynton v. Payrow*, 67 Me. 587.

The bill prays that the defendant be directed to make a transfer of the stock in question on its books to the orator upon the surrender of said certificate No. 75, and to issue a new certificate therefor to the orator. It also contains a prayer of general relief. But the particular relief thus prayed for should not be granted; for the stock so transferred with a new certificate therefor might by sale or pledge come into the hands of a holder for value without notice of any intervening equity, and thereby the defendant's lien be jeopardized if not defeated altogether.

¹³¹ Under the general prayer, however, the orator may have that relief to which, in the circumstances of the case, it is entitled.

A pledgee of goods does not acquire an absolute title thereto by failure of the pledgor to pay the debt or redeem the property at the time limited. His only interest is a special property to retain the goods for his security. Unlike the case of a mortgage, there is no forfeiture, but the pledgee may enforce his security and cut off the pledgor's right of redemption by a lawful sale of the pledge, and whenever the purpose of the pledge is satisfied, the right to the surplus, if any, is in the pledgor or some one having an interest in the general property under him. As before indicated, the pledgor retains the general title, and if no time of redemption is limited by the contract, the legal right to redeem is with him during his lifetime unless the creditor, in the meantime, calls upon him to redeem, and if he die without such call, the right descends to his personal representatives: 2 Kent's Commentaries, 582; *Gifford v. Ford*, 5 Vt. 532. It follows that the orator has no right of strict foreclosure, as in the case of a mortgage, for this would work a forfeiture where none was intended by the contract, and consequently where none could result at law: See *Carter v. Wake*, L. R. 4 Ch. D. 605, before cited. The pledge should be foreclosed and sold by the orator under judicial decree that the avails thereof may be applied according to the rights of the parties as herein determined.

The defendant claims the benefit of the statute of limitations by its answer, and urges the same in argument. Since the corporation was affected by the contract of pledge after notice equally as much as if the transfer of the stock had been made upon its books, there is no color for the statute's being a bar to the enforcement of such transfer as may be necessary in the execution of the trust.

¹³² It is further urged that if the orator has equitable rights which accrued prior to the lien of the defendant, the orator has slept upon them for seven years, and they should not now be allowed priority over the defendant's lien. This lien, however, attached with the advancing of money to Tarbell within less than three years and seven months after the defendant received notice of the pledge to the orator. No claim is made that the orator was then guilty of such laches as deprive it of priority. Neither is any claim made that

the orator, with notice of the defendant's equities, has ever done any act to the defendant's prejudice. The credit was given to Tarbell by the defendant with full knowledge of the orator's interests. In these circumstances, it would be inequitable to give the defendant greater rights than it took in the creation of its lien.

The unpaid dividends have accrued since the demand was made upon the defendant for a transfer of the stock. No question is made but that they stand as an incident to the stock, and are governed by the same principles.

Since Tarbell still holds an interest in the general property, ordinarily he should be made a party to this suit. But here the orator has filed in this court the written consent of Tarbell that the stock may be sold by the orator under judicial decree in this case, and that the proceeds of such sale may be applied, first, to the payment of the orator's said debt secured by the pledge, and interest thereon, together with the expenses of the sale; and, second, that the balance of the proceeds of such sale, if any there be after the payment of the orator's debt, interest, and expenses as aforesaid, be paid to the defendant to be applied on its said note against Tarbell. Thereby the necessity of making Tarbell a party to the suit has been obviated, and the case can proceed to final decree.

The pro forma decree is reversed, and the cause remanded, with mandate.

If the Charter of a Bank Provides that no assignment of its stock shall be valid as against it, unless a formal transfer thereof shall be made on its books, the bank has a right to treat a stockholder as the true owner of stock issued to him and to deal with him as such owner, until it has notice that he has assigned his stock to a third person; but after such notice has been brought home to the bank it has no right to extend further credit to such stockholder upon the faith of his ownership of such stock or in any way treat him as such owner, although the stock has not formally been transferred on the books of the bank: *People's Bank v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144. See, in this connection, *Lipscomb v. Condon*, 56 W. Va. 416, post, p. 138.

SAWYER v. CHURCHILL.

[77 Vt. 273, 59 Atl. 1014.]

HUSBAND AND WIFE—Marriage Settlement—Consideration.

If a wife, by written contract expressed to be in consideration of a certain sum paid her by her husband, releases him from all claim which she, as his wife, may have against him, such release exhausts the consideration, and a subsequent provision in such contract that "for said consideration" she conveys to his children all interest which, as his widow, she may have in his estate, is without consideration. (p. 763.)

HUSBAND AND WIFE—Separation Agreement.—A written contract made by a wife to her husband shortly after their marriage, whereby, in consideration of a certain sum paid her by him, she releases him from all claims which, as his wife, she may have upon him, and reciting that such contract is made in pursuance of a contract made between them on their wedding day, is opposed to public policy and will not be enforced. (pp. 763, 764.)

HUSBAND AND WIFE—Separation Agreements.—Courts of equity will not specifically enforce the performance of contracts tainted with an understanding, contemporaneous with the marriage, looking to a possible or probable separation in the future, and, in the nature of things, tending to bring such a separation about. (p. 764.)

G. A. Davis, for the plaintiff.

Hunton & Stickney, for the defendant.

275 HASELTON, J. This is a bill in chancery brought by the children of Zebedee P. Churchill, deceased, against Sarah Emeline, his widow, and against the administrator of said Zebedee. The bill sets up among other things that said Sarah Emeline was the third wife of said Zebedee, and not the mother of any of his children; that she was married to him January 21, 1898, and that she lived with him only about five months, when by mutual consent a separation took place, and that they ever after lived apart from each other, the said Zebedee dying December 17, 1902; that after said separation, said Sarah Emeline did nothing toward the support and care of said Zebedee, who was an old man in need of care, comfort and assistance.

The bill further states that June 7, 1898, which was within five months after the marriage, the said Zebedee and the said Sarah Emeline entered into a certain written and **276** sealed contract which is set forth. This instrument, however, recites a contract made between husband and wife on their wedding day, by virtue of which the wife should release the

husband from all claims which she, as wife, might have upon him, upon the payment by him to her of the sum of three hundred dollars. The instrument further recites the payment of the three hundred dollars, and proceeds as a release from her to him of all claims upon him as wife, and an agreement to maintain herself in sickness or in health and without any claim upon him by her or in her behalf. In referring to the date of the wedding as the date of the contract, the phrase "to wit" is used, but this instrument is not a piece of pleading, and the phrase has here no materiality. The bill further sets out that the husband paid the three hundred dollars, and that this instrument was thereupon delivered by the said Sarah Emeline to the said Zebedee, and that he accepted it, and retained possession thereof until his death. It would appear, then, that contemporaneously with the contract of marriage solemnized by the state, there was an agreement between the parties that marital rights and obligations should cease whenever the husband should pay the wife the three hundred dollars specified. To avoid harsh phraseology, the marriage seems to have been experimental, so far as the parties thereto could make it so; a travesty of marriage and a mockery of marriage vows.

The instrument further recites that for the "same consideration" the said Sarah Emeline releases, assigns, and conveys to the orators all right, title, interest or claim which she "may have as widow" in or to the estate of her said husband. But according to the recitals of the instrument, this consideration was exhausted in the procurement of the release of the claims of the wife to support, and so there was no consideration for the assignment to the orators of any claim which she "as widow" might thereafter have upon her husband's ²⁷⁷ estate. There was no consideration for the assignment moving from the orators, or from the husband or anyone else for the benefit of the orators. The bill further sets out, in effect, that there was no rescission, or attempted rescission, of the contract in the lifetime of Zebedee, and that after his death, on the twenty-fifth day of July, 1903, and not before, she offered to "return" the principal sum of three hundred dollars to the administrator of said Zebedee. It appears from the bill that this offer was in the presence of the probate court, and that the orators protested that the administrator should not accept the offer. It further appears from the bill that June 6, 1903, the said Sarah Emeline

filed a widow's waiver as full and complete as could be filed under the Vermont statutes and amendments thereto, and demanded an allowance out of the estate. However, the widow's waiver, contemplated by the statute, is of some provision of some kind the benefit of which she is to get upon or after the husband's death: *Chaffee v. Chaffee*, 70 Vt. 231, 40 Atl. 247; Acts 1896, No. 44. The bill further states that the sum of three hundred dollars paid to said Sarah Emeline was a just, adequate and reasonable share for her out of the estate of her husband.

The bill prays that specific performance on the part of said Sarah Emeline Churchill may be decreed, that temporary restraining orders may be made, and that general relief may be granted. On demurrer the bill was dismissed and the orators appealed.

We think that the court of chancery was right in dismissing the bill. Separation agreements, not contemplated at the time of marriage, and not brought about by a frivolous view of the marriage obligation, may come about for such reasons, and may be of such a character that courts of equity will recognize them and will enforce the specific performance of pecuniary agreements relating thereto. But the state is,²⁷⁸ on grounds of public policy, interested in the permanency of a marriage relation which it has sanctioned, and courts of equity ought not to enforce the performance of contracts tainted with an understanding, contemporaneous with the marriage, looking to a possible or probable separation in the future, and, in the nature of things, tending to bring such a separation about. *Squires v. Squires*, 53 Vt. 208, 38 Am. Rep. 668, contains in the opinion of the court delivered by Judge Veazey, a valuable discussion of separation agreements, and points out those that courts may recognize, at least for some purposes. A lengthy and able review of the history and doctrine of agreements for separation is found in the recent case of *Foot v. Nickerson*, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554.

But there is hardly need in this case to refer to the very numerous and very conflicting cases which relate either to separation agreements or to some of the incidents thereof. The bill, as drawn in this case, seems to have to do with an option of separation, taken and given on the occasion of the marriage—an option of such a character that, in any resulting state of things, a court of equity ought not to interpose.

The decree of the court of chancery dismissing the bill is affirmed and the cause is remanded.

Separation Agreements between Husband and Wife are discussed, as to their validity and effect, in the monographic notes to *Baum v. Baum*, 83 Am. St. Rep. 859-885; *Stephenson v. Osborne*, 90 Am. Dec. 367-370.

PATCH MANUFACTURING COMPANY v. PROTECTION LODGE.

[77 Vt. 294, 60 Atl. 74.]

CONSPIRACY—Evidence.—In an action against a lodge of a mechanics' union for damages for interfering with the business of another by means of a boycott and strike, in pursuance of a conspiracy, testimony that a member of such union informed the witness that he had been ordered by his union to quit work, but that he would later withdraw from such union and return to work, together with the fact that he did quit work, did not withdraw from the union, but remained an active member, and that he had no personal grievance, is admissible as tending to show the existence of the conspiracy. (p. 776.)

CONSPIRACY—Evidence.—In an action against a lodge of a mechanics' union for damages for interfering with the business of another by means of a boycott and strike in pursuance of a conspiracy, evidence that certain papers purporting to emanate from the defendant or a committee of the defendant bore its seal is admissible as tending to show the source of such papers, although the defendant was not a corporation. (p. 777.)

CONSPIRACY—Boycott—Evidence.—In an action against a mechanics' union to recover for an interference with the business of another by means of a strike in pursuance of a conspiracy, evidence that several members of such union whose names were signed to a writing directed to plaintiff relative to a settlement of such union's demands, and purporting to emanate from its committee and bearing its seal, subsequently called upon plaintiff in relation to the strike brought about by such union is admissible in connection with the denial of such men that they signed such writing, or were authorized by such union to sign it. (p. 779.)

CONSPIRACY—Strikes—Evidence.—In an action against a mechanics' union to recover damages for an interference with the business of another by means of a strike in pursuance of a conspiracy, evidence that many circulars relative to the strike of plaintiff's employes, ordered by such union, and bearing the names of its officers, and obviously designed to prevent workmen from entering plaintiff's employ were posted and widely distributed, is admissible, and raise the inference that such circulars were promoted and distributed by such union. (p. 779.)

CONSPIRACY—Evidence to Establish.—If it is sought to establish a conspiracy by a mechanics' union, and there is some evidence of the conspiracy, testimony that a certain person was employed by such

union to assist in a strike and prevent men from going to work, together with evidence of his acts of violence in this connection, is admissible. (p. 780.)

CONSPIRACY—Liability for.—If a labor union forms a conspiracy, and a person not a member of such union voluntarily joins in the doing of unlawful acts in aid of the scheme, the union is liable for his acts. (p. 781.)

CONSPIRACY—Co-conspirators.—It is not necessary, in order to establish that the defendants are co-conspirators, to prove that the conspiracy originated with them, or that they met during the process of the concoction of the scheme. Every person entering into a conspiracy already formed is deemed in law a party to all acts done by any of the other parties, before or afterward, in furtherance of the common design. (p. 781.)

CONSPIRACY—Co-conspirators.—One to be chargeable as a co-conspirator need not have been an original contriver of the mischief, for he may become a partaker in it by joining the others while it is being executed. If he actually concurs, no proof is required of an agreement to concur. (p. 781.)

CONSPIRACY—Co-conspirators.—If there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are at all the time engaged. (p. 781.)

CONSPIRACY—Evidence of Acts of Conspirators.—In an action against co-conspirators, the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. (p. 782.)

CONSPIRACY.—Declarations made by one conspirator, pursuant to the common object, and in furtherance of it, is admissible against all of them when the combination is once established. (p. 782.)

CONSPIRACY—Order of Proof.—If, in an action against conspirators, all of plaintiff's evidence has some tendency to show the conspiracy claimed and the results of it and efforts made by the conspirators to make it effectual, no complaint will lie as to the order in which the proof was received. (p. 782.)

CONSPIRACY—Threats of Conspirators—Damages.—In an action against a machinists' union to recover for a strike and boycott pursuant to a conspiracy, any threat made by the defendant or by anyone associated with it, to boycott any boarding-house keeper who entertained, or any merchant who supplied workmen in the employ of the plaintiff, with the necessaries of life, if made directly and exclusively to such persons, is an unlawful interference with the rights of the plaintiff. (p. 786.)

TRIAL—Charge of Court.—If a judge drops a word or expression, in the course of a long charge, contrary to its whole theory, and so plainly error as to force the impression of inadvertence, it is plainly the duty of counsel to call attention to it, and not let it pass in reliance upon a general exception in the event of an adverse verdict, and in the latter event advantage cannot be taken of such inadvertence. (p. 787.)

TRIAL—Instructions.—If instructions, taken as a whole, correctly state the law, and there is no fair ground to say that the jury

was misled thereby, they ought to stand, although they contain some expression that, if taken alone, would be error. (p. 787.)

CONSPIRACY—Records of Conspirators.—In an action to recover for a strike and boycott pursuant to a conspiracy, and upon proof of such conspiracy, the fact that a common design existed between different associations, with whom the defendant is alleged to have conspired, makes the records of all such associations the records of the defendant, and admissible in evidence against him as such. (p. 788.)

EVIDENCE—Failure to Produce Books and Papers—Presumption.—If a defendant, after having been duly notified to produce books and papers at the trial, fails or refuses to do so, it may be presumed that such failure or refusal is because such books and papers, if produced, would operate against his claim and in favor of the claim of the plaintiff. (p. 789.)

EVIDENCE—Suppression of—Presumption.—If the defendant suppresses evidence which he has been duly called upon to produce, it may be presumed that plaintiff's claim upon such evidence is true, and that defendant's claim thereon is false. (p. 790.)

EVIDENCE—Spoliation of—Presumption.—The spoliation of evidence raises the presumption that it is against the person guilty of the act of spoliation, but such presumption does not relieve the other party from introducing evidence tending affirmatively to prove his case in so far as he has the burden of proof. (p. 790.)

APPEAL—Motion to Set Aside Verdict—Misconduct of Juror. If on a motion to set aside a verdict on the ground of the misconduct of a juror, the lower court takes testimony on both sides, and denies the motion, but files no statement of fact, the question cannot be reviewed on appeal. (p. 790.)

J. C. Baker, O. M. Barber and M. C. Webber, for the plaintiff.

P. F. McManus, T. H. Browne and J. K. Batchelder, for the defendant.

300 TYLER, J. This is an action on the case brought by the plaintiff, a corporation, against the defendant, a partnership and unincorporated association consisting of more than five members, and having a president, secretary, clerk and treasurer, to recover damages for the defendant's alleged unlawful ³⁰¹ acts of interference with the plaintiff in the prosecution of its business.

It appeared that the plaintiff, prior to the acts complained of, was a manufacturing corporation duly organized under the laws of this state, located and doing business in the city of Rutland; that its business was the manufacture of machinery for mills and stone work of all kinds, also of various other kinds of machinery and engines, and it carried supplies for steam fitters and mills in this and other countries; that it had erected an expensive and valuable plant with ade-

quate power, and employed about one hundred skilled machinists, also molders and other workmen; that it had a large amount of capital invested in its business which was carried on at a profit, and that at the time of the alleged wrongful acts of the defendant it had contracts on hand with customers to furnish them its goods at a profit when manufactured.

The defendant association was composed of machinists, many of whom were employed in the mills and shops of the plaintiff, and the plaintiff claimed that the defendant conspired with its members and with other labor organizations in Rutland and vicinity to force the plaintiff to adopt a schedule of hours of labor by which nine hours should constitute a day's work, and to increase the wages of its workmen so that the plaintiff could not do business at a profit nor complete its contracts except at a loss; that the plaintiff refused to comply with this demand, and that thereupon, on May 20, 1902, the machinists, at the order and direction of the defendant, quit their work and conspired and confederated together and with divers other persons unknown to the plaintiff, to oppress the plaintiff and force it to accede to their illegal demands, and by threats, intimidations, bribery and violence sought to intimidate and drive away the other workmen of the plaintiff, and detailed pickets, spies and watchmen to stand guard about ³⁰² and near the plaintiff's works and prevent other workmen taking employment therein; that they intercepted and prevented, by threats, bribes and violence, other men whom the plaintiff had employed and who were on their way to Rutland, from engaging in the plaintiff's service; and that in carrying out their conspiracy, by threats and intimidations, they caused a large number of workmen whom the plaintiff had employed and who had entered upon its service to quit its service; that the defendant and its co-conspirators visited the keepers of boarding-houses and merchants, and by threats to boycott and injure their business induced and coerced them to refuse to board and entertain and to sell goods and necessities to such workmen; that they made attacks upon boarding-houses where the workmen were boarded, and attacked, assaulted and annoyed them on the streets and at their boarding-houses, and thereby drove away from the plaintiff's employment large numbers of such workmen, all which conduct injured the plaintiff in its business.

The defendant denied the conspiracy alleged and claimed that whatever was done by it and the other associations was, through a lawful combination among them, to effect by lawful means the lawful purpose of forcing the plaintiff to lessen the hours of labor and increase the wages of workmen.

No question was made in the court below in respect to the sufficiency of the declaration, therefore it cannot be considered here.

The plaintiff offered evidence tending to establish all the material allegations in the declaration, most of which was received under the defendant's exception. The defendant relies upon seven exceptions to the admission of evidence: 1. The testimony of Patch about the visit of a committee, and what they said to him; the admission of plaintiff's exhibits 1 and 2 and all that Patch testified to upon the subjects ~~to~~ to which they related, and especially to all that the committee said to him upon that occasion. This exception was taken upon the ground that it was not shown that the committee was a committee of the defendant; 2. To the testimony in respect to the threats and acts of McDonald; 3. About the distribution and posting of exhibits 4 and 5 called "stickers"; 4. The testimony of Alexander Sanhegrin on the ground that there was no proof that Page was a member of defendant lodge, nor that E. A. U. Hall was used exclusively by that lodge; 5. As to all testimony in respect to the acts of Pennington and others relating to a boycott; 6. To the testimony relating to the acts of Young and Hines; 7. To all testimony respecting the conduct of Martin for the same reason.

All these exceptions were upon the ground that if the various acts testified to were in fact committed, the plaintiff had failed to show that the defendant directed or sanctioned them, or was in any way responsible for them; that these acts, if committed, were upon the motion alone of the plaintiff's striking employes for the purpose of shortening time and increasing wages, and that these acts did not emanate from the defendant lodge nor any of the other lodges mentioned, and were not evidence of the conspiracy alleged.

1. The plaintiff's evidence tended to show that, being engaged in business as alleged, on May 11, 1902, it received a written communication which reads:

Plaintiff's Exhibit 2.

"International Association of Machinists.

"Rutland, Vt., May 11, 1902.

304 "To the Patch Manufacturing Co.

"Gentlemen: Representing the machinists employed in your shop, we respectfully request that you establish the following conditions in the Patch Manufacturing works:

"1. Fifty-four hours to constitute a week's work. Any time over this to be considered overtime and to be paid for at the rate of time and one-half:

"2. That the company recognize the union and union principles.

"In explanation we would say that we must be governed by the Grand Lodge I. A. M., and to hold our charter and remain union men we are forced to ask recognition. We further call your attention to the fact that only union work goes in many places, and we have to endorse your product as fair. If we do so longer, we feel that we must receive the benefits.

"If the capacity of shops is insufficient we suggest that our union men will always be glad to help out any situation by working evenings or to help out the same as at present.

"We mean by recognition of the union the meeting of shop committee to settle any differences on the same plan as molders. Will be pleased to receive your reply on or before Wednesday night, May 14, addressed to Protection Lodge No. 215, Rutland, Vt.

"[Seal of Protection Lodge.]"

The plaintiff's evidence also tended to show that on May 20th a large number of the plaintiff's machinists and other workmen struck and left its employment, and that a few hours later on that day F. R. Patch, who was the plaintiff's president and general manager, found upon his desk a written communication stating that the committee of Protection Lodge No. 215, I. A. of M. would meet at the E. A. U. Hall at 3 P. M. that day, and that any communication would be respectfully ³⁰⁵ considered. This paper had upon it an impress of the seal of the defendant lodge and had appended the names of ten men, five of them purporting to be those of J. A. Keenan, N. J. Howley, J. E. Capeless, J. P. Hinchey and M. H. McLaughlin, five of the machinists who had struck and who were afterward shown to have been at that time

members of the defendant lodge; that these five men afterward called upon Mr. Patch for an answer, but made no reference to either of said papers, and the defendant's testimony tended to show that these five men never signed, authorized or knew of the last-named paper.

The plaintiff's evidence tended to show that the defendant and some or all of its members confederated together and with other lodges of other classes of workmen and the members thereof, and in like manner drove away from the plaintiff's service workmen of the plaintiff who did not strike and leave the plaintiff's service on May 20th, and other workmen whom the plaintiff had since that time employed.

Among the specific acts that the plaintiff's evidence tended to show were committed by the alleged conspirators were that they detailed pickets and special watchmen to watch the railroad station for the arrival of men to patrol the streets of Rutland, to stand guard about the plaintiff's works to prevent other workmen from taking employment therein; that they sent out spies and watchmen upon the roads and railroads leading to Rutland and intercepted men who were on their way to enter the plaintiff's service, and by threats, bribes and promises in many cases prevented such men from entering the plaintiff's service; and that the defendant also combined and confederated with other persons unknown to the plaintiff to do and in doing the acts alleged.

That after the strike was on the defendant appointed Walter Newton and John E. Capeless, two of its members, to ~~306~~ conduct the strike, and that they employed one Martin to assist them. The testimony of the defendant's recording secretary tended to show this fact.

The plaintiff's evidence tended to show that Martin was active in intercepting men who were on the trains and public roads going to Rutland to take the places of men who had left the plaintiff's employment, and by promises, threats, intimidation and personal violence he tried to turn them back and prevent their engaging in its service, and in some cases he succeeded in so doing.

There were other lodges of workmen in Rutland with numerous members, and some of the members of some of these lodges were in the plaintiff's employment.

The plaintiff's testimony tended to show that by reason of the wrongful acts of the defendant it was unable to complete its contracts and take others, and was injured in its business.

Mr. Patch testified, under defendant's objection and exception, that on September 23d eight new employes arrived, when he heard a disturbance at the entrance to the plaintiff's works, went out and saw a large mob, and that one Vincent, who was then in the plaintiff's employment, was being roughly handled by McDonald, a man who had been in the plaintiff's employment until the strike; that the witness warned McDonald that he was violating the injunction, and that the latter replied: "Hell with your injunction; do your worst"; that McDonald made threats to Vincent if he returned to work. The plaintiff did not show, nor did any testimony in the case tend to show that McDonald was a member of Lodge 215, or had any connection whatever with the strikes, or that any of the strikers or any of the members of the lodge, or anybody connected with the claimed conspiracy, approved of what he said or did, excepting so far as his acts ³⁰⁷ above set forth tend to show these things; and excepting, also, so far as such testimony may be presumed as tending to show these facts from the failure of the defendant to produce its books and records and lists of membership. The plaintiff claimed that the defendant's books and records and lists of membership, called for and ordered to be produced and not produced, would have shown all these facts.

This incident was only one of many incidents introduced by the plaintiff tending to show intimidation and interference with the plaintiff's workmen and with men brought to Rutland by its agents for the purpose of filling the places of the strikers. The testimony in many of the other incidents tended to show that such intimidation and enticement of and interference with the plaintiff's workmen and men seeking its employment were done by members of the defendant lodge, its agents and co-conspirators; and much evidence of that class was admitted without objection.

The issuing of plaintiff's exhibits 4 and 5 were not shown to have been done directly by the defendant. Witnesses testified to having seen the circulars in the office of the machinists, which was the headquarters of that class of workmen when they were out of employment, and these circulars were sent to the different machinists' offices throughout the country. They were admitted under defendant's exception, and are:

Plaintiff's Exhibit 4.

"Rutland, Vt., May 20, 1902.

"TROUBLE IN RUTLAND.

"We have been on strike since May 20th, and we are obliged to continue the fight to the end:

"Therefore, This is to apprise all Machinists and Helpers, Metal Workers, Blacksmiths and others that their fellow toilers in Rutland, Vermont, are on a strike against the unreasonable refusal of the Lincoln Iron Works and F. R. ³⁰⁸ Patch Mfg. Co., to accede to the request for a fair adjustment of time and pay.

"[Typographical Union label, Rutland, Vt.]"

Plaintiff's Exhibit 5.

"Rutland, Vermont, September 1, 1902.

"TROUBLE IN RUTLAND SINCE MAY 20, 1902.

"This is to notify Machinists, Molders, Metal Workers, Blacksmiths, and others, that

"The strike is still on at the F. R. Patch Mfg. Co., and Lincoln Iron Works, and will be kept on until we get a fair adjustment of our demands.

"[Typographical Union label, Rutland, Vt.]"

The plaintiff claimed, and introduced testimony tending to show, that money was paid by the defendant and by its individual members to induce men to leave the employment of the plaintiff, during the strike, which continued several months, and to keep men from entering its employment, and introduced as a witness Alexander Sanhegrin, who testified that he went out with the men on the strike and then went to the E. A. U. Hall in company with Howley, and under the defendant's exception testified that Howley promised him six dollars a week and his board if he would go out, and that he received fifty cents; that Howley got the money from Page. There was no proof that Page was a member of defendant lodge, nor of any other lodge, nor that he was connected with the strike, excepting that the plaintiff's testimony tended to show that Page was then in said hall with Howley, and whatever presumption might arise that Page was a member of defendant lodge and a conspirator with the defendant from the failure of the defendant to produce its books, records and list of membership. It appeared that this hall was not used exclusively by said lodge nor controlled by it, that it belonged

to a third party, that this and various associations ³⁰⁹ held meetings in it, that the defendant used it as a lodge-room, and that it was used for various purposes before and during the strike. The plaintiff claimed that the records would have shown that Page was a co-conspirator with the defendant.

The plaintiff's evidence tended to show that after the strike was on Walter Newton, who was a member of defendant lodge, and one Pennington, who was a member of the Retail Clerks' Protective Association, and at that time secretary of the Central Trades and Labor Council, interviewed a firm that was engaged in the plumbing business, and was then plumbing a boarding-house which the plaintiff was repairing for the purpose of boarding its workmen therein, and by threats and intimidations tried to induce said firm not to do such plumbing, and that this was done to prevent the plaintiff from providing a place for boarding and lodging its workmen, and thus prevent it from obtaining them.

The testimony as to Pennington's acts stands upon the same ground as Newton's. He went with Newton to visit the plumbers, as before stated, but it was not shown that either went by the procurement or knowledge of the defendant nor of any other lodge, but for anything that appeared, of their own motion, excepting that Newton was a member of defendant lodge, a member of the strike committee appointed by the defendant, and a delegate to the Central Trades and Labor Council, and that Pennington was then a member of and secretary of that council.

Pennington testified that during the summer of 1902 he was secretary of the council, which was composed of three delegates from each one of the several unions in Rutland and vicinity; that Protection Lodge No. 215 was one of these unions at the time he was secretary, and that Walter Newton was at one time a delegate to the council. Pennington's testimony tended to show that the matter of the strike was ³¹⁰ brought up more than once at the meeting of the council in the summer of 1902 by the delegates from defendant lodge; that they explained the situation and the different delegates talked it over, and that he signed the plaintiff's exhibit No. 3, "Central Trades and Labor Council, C. W. Pennington, secretary," but could not say whether he signed it for the council or not. In cross-examination he said he had no authority to sign it, and that so far as he knew the council never authorized, sanctioned or indorsed his action in signing it, and that

it was never to his knowledge brought to the attention of the council. The plaintiff claimed that the books and records of the council called for and not produced would have shown, had they been produced, that he signed said exhibit by the authority of the council, and that the council authorized, sanctioned, and indorsed it. The plaintiff also claimed that the books and records of the defendant would have shown that the authorization and approval were at its request and in furtherance of the plans of conspiracy; and under the defendant's exception, Pennington was allowed to testify, among other things, that he told Loveland that the union was anxious to bother, in a certain way, the people who were coming there to work for the plaintiff, make it a little unpleasant for them without violence, and see if they couldn't get them to go back and not work, and that he asked Loveland not to complete the job of plumbing. Pennington testified that he and Newton told Loveland that if the report were circulated that he was doing this work, possibly he would lose some individual trade he was getting at that time; that this was their opinion in the matter.

The plaintiff's evidence tended to show that Tilly C. Young was a member of the Carpenters' Union, and until the 1st of July, 1902, its secretary; that Hines was in the plaintiff's employment, and was also a member of that union, and ³¹¹ that they requested a private meeting with Patch; that they told him they had been ordered by their union to quit work that night, under a penalty of a fine of five dollars a day; that they were being watched by delegates from that union and asked Patch's advice, which being refused, Young said he should go out, withdraw from the union and then return to work if Patch would allow it; that Hines said he would stay, and Young said he would go out, and went. Patch was allowed to testify, under defendant's exception, that he told Young that he would keep his place for him if he returned. Neither Young nor Hines were members of defendant lodge, but were members of the Carpenters' Union.

The testimony of Patch as to his interview with Young, a member and the secretary of the Carpenters' Union, was properly admitted for the purpose for which it was offered. The plaintiff had introduced evidence tending to show a conspiracy with the defendant on the part of the Carpenters' Union. It is true that neither the defendant nor the union could be affected by Young's declarations, which were not in further-

ance of the common design, or did not accompany and explain an act then being done by him in such furtherance; but mere words may be an act, as were the shouts of the mob in Lord Gordon's Case, 21 How. St. Tr. 535, and the conversation among conspirators in Lord Stafford's Case, 7 St. Tr. 1218, and in State v. Glidden, 55 Conn. 46, 82, 3 Am. St. Rep. 23, 8 Atl. 890. So a letter may be an act, though never sent, as in Hardy's case, 24 St. Tr. 199, 475. But here was a physical act being done by Young which his declarations accompanied and tended to explain, namely, his striking work at the plaintiff's plant. It is argued that the fact that he then arranged with Patch to come back as soon as his secretaryship expired, and he could legally withdraw from the union, showed that his leaving was not in furtherance of the conspiracy, but for his own benefit, and ³¹² against the interest of the conspirators. But he went out at the call of his union, having no grievance of his own. He did not return, and Patch never met him again. He did not withdraw from the union, but remained in it and was re-elected secretary six months afterward, held the office until the trial, and as secretary executed votes and orders of the union in respect to the strike. He conducted in such a manner as a witness, when called by the plaintiff to produce the books and records of the union and in disobeying the subpoena served on him for that purpose, that he was ordered into custody and required to show cause why he did not obey the subpoena. He was told that when his examination was completed the court might be satisfied that he did not intend to perjure himself, but whether the court became thus satisfied does not appear. The evidence and the proceedings shown by the transcript, which is referred to for all purposes relevant to the exceptions taken, fully justify the inference, if indeed they do not force the conclusion, that Young struck with no intention of returning, and that his arrangement with Patch was a mere pretext to conceal the real purpose of his going out; all which justifies the further inference that he was acting in connection with the conspirators in furtherance of a common purpose. His act and declarations, therefore, viewed in this light, as the jury had a right to view them, concurring as they did with the acts of the defendant and of the union in point of time and in adaptation to accomplish the same object, tended to make Young a conspirator with both of them, and consequently were admissible.

It appeared that the defendant sent delegates to the council, and the evidence tended to show that at different times these delegates brought up the subject of the strike in the council and explained the situation; that the matter was talked over among the different delegates, but that it did not appear ³¹³ that any action was taken by the council except that the plaintiff's evidence tended to show that Jones and Stockwell, who had interviewed the Combination Cash Store people, represented themselves as a committee from said council for the purpose of boycotting the store.

That members of the Plumbers' Union, of the Central Trades and Labor Council, and of the Carpenters' Union, who were claimed to be co-conspirators with the defendant, visited the store and tried to induce its officers to refuse to sell goods to the plaintiff's workmen who had refused to strike, and to other workmen who had been employed.

The plaintiff claimed that exhibit 3 tended to show the conspiracy between the defendant and its members, said Council and the Carpenters' Union and their members, and that the books and records would have shown such conspiracy. Pennington testified that he had no authority for signing exhibit 3; that there was no action of the council authorizing him to sign it; that the council never sanctioned it; that it was presented to him for signature; that he signed it without reading it, and that he thought it was a paper that should be signed. The plaintiff claimed that the books and records would have shown authority from the council to Pennington to sign said exhibit which reads:

“NOTICE TO UNION MEN.

“Rutland, Vt., Oct. 10, 1902.

“To Organized Labor, Everywhere.

“Greeting: The F. R. Patch Mfg. Co. and Lincoln Iron Works are on the unfair list, having been placed there by the General Executive Board of the International Association of Machinists, and also by the International Association of Marble Workers at their convention held in Detroit, Mich., June 23 and 24, 1902. The above-named firms are members ³¹⁴ of an association composed of the leading machine and marble manufacturers of this vicinity, who have been and are now discriminating against members of the Union, whose avowed purpose is to crush the labor organizations of this vicinity. We have been on strike since the 20th of last May for the nine-hour day and just treatment for Union men. There are

associated with us in this strike the Iron Moulders, Carpenters, Blacksmiths and Federation of Labor, who are standing true to their demand for fair treatment. Both firms are doing a limited amount of work with a class of help familiarly known as 'scabs.' Can you not see your way clear to give us some measure of assistance, other than in a financial way?

"Trusting that you will do what you can to help us and extending to you our heartfelt gratitude for anything you may do, we remain,

"Fraternally Yours."

To the above paper were appended, in typewriting, the names of six local associations, with the names of their respective presidents and secretaries, the defendant's heading the list, and in like manner the "Central Trades and Labor Council, C. W. Pennington, secretary," closing with the words: "Typographical Union Label, Rutland, Vt."

A considerable amount of testimony was introduced by the plaintiff, under the defendant's exception, tending to show various acts of intimidation by Martin to men who remained in the plaintiff's employment, and to new men who had been employed, and that he was active in the distribution of exhibit 3. The testimony of Tait, the defendant's secretary, tended to show that Martin was in Rutland in the summer of 1902, and was employed by, or at least acting for, the union in relation to the strike; that he was helping to keep men from working at the shops; that he was employed by Capeless and Newton, who were a committee of defendant lodge, and ³¹⁵ that Martin was not a member of the lodge. The plaintiff claimed that the books and records would have shown that Martin was employed by the defendant to help conduct the strike, and the defendant claimed the contrary—that he was not a member of defendant lodge, nor an employé of any committee of the lodge, and denied that the defendant appointed or authorized any committee to conduct the strike.

The rule of law that a person cannot prove his claimed agency by his own declarations does not apply to this case. The question is whether the plaintiff's evidence tended to show the conspiracy alleged.

To review the evidence briefly: The defendant was a local protection lodge of the International Association of Machinists, and it may be assumed that it was organized for the protection of the interests of its members who were machinists,

a part of whom were in the plaintiff's employment. A strike from the Lincoln Iron Works, a corporation engaged in the same business as the plaintiff's, was made at the same time and by the same classes of workmen. The matter of the strike was brought up more than once at the meetings of the council in the summer of 1902 by delegates from defendant lodge, who discussed and explained the situation. On May 11th the plaintiff received exhibit 2; on May 20th came the strike, and three hours later the plaintiff received exhibit 1. Both these papers bore the impress of the seal of the defendant. It is of no importance that it was not a corporation, and that the seal was not a corporate seal. Its impress upon these papers was a circumstance proper to be considered with other evidence in the case tending to show that "The Committee" was a committee of the defendant, and that these papers emanated from it. The ten men who signed the second paper were all members of the lodge. Sheldon, who was one of the ten signers, procured typewritten copies of it to be made. That five of ³¹⁶ these signers called upon the plaintiff's president two days later, one of their number saying to him that they thought he would like to see a committee, that they had come for an answer, and then making their demand, are facts that were proper for the jury to consider in connection with the denial of these men that they signed the paper or were authorized by the defendant to sign it.

The printed "stickers" were widely circulated in and about Rutland and in New York City, and exhibits 4 and 5, if not exhibit 3, were sent to the different machinists' lodges through the country for the obvious purpose of preventing other workmen from entering the plaintiff's employment while the strike was on.

It must have been common knowledge in Rutland that these great strikes were on, that the strikers were trying to prevent new men from entering the plaintiff's works, and that these circulars were distributed for that purpose. It is not conceivable that the defendant's officers could have been ignorant of these proceedings. The name of J. F. Tait, recording secretary, was appended to the circulars under that of C. F. Nourse as the defendant's president, and the jury might have inferred that the defendant directly or indirectly promoted the distribution of the circulars.

The evidence relative to the acts of Martin and McDonald tends as remotely as any evidence in the case to show that the

defendant was a conspirator in the strike; yet secretary Tait testified that Martin, though not a union man, was employed by a committee and helping to prevent men from coming to work at the shops. The witness said, "not employed by the lodge particularly," but "by the committee."

McDonald had been in the plaintiff's employment until the strike. There was no evidence that he was a member of defendant lodge nor that he was employed by anyone to ⁸¹⁷ commit acts of violence; but, on the occasion testified to, there were present with McDonald, near the plaintiff's works, a crowd of about two hundred men, and some of the plaintiff's workmen were being detained by men in the crowd, and McDonald laid hold of one workman, threatened him and tried to draw him away. McDonald's acts and declaration alone were not admissible as tending to show the conspiracy alleged in the declaration, but if the other evidence in the case tended to show it, then his acts were properly shown as an incident in it, like evidence tending to show that the plaintiff's works were picketed by men unknown to the plaintiff's officers for the purpose of preventing new men entering the shops until the plaintiff had yielded to the demand for fewer hours of labor.

The testimony as to the doings of the mob on this occasion was received without objection, and this incident was only one of many introduced by the plaintiff tending to show intimidation of, and interference with, the plaintiff's workmen and men brought to Rutland by its agents for the purpose of filling the places of the strikers.

The testimony as to many of the other incidents referred to tended to show that the acts of intimidation and interference were committed by members of the defendant lodge and its agents and co-conspirators. Since these various incidents were concurrent in point of time, within the meaning of the law, and alike in adaptation to accomplish the general design of the conspiracy, they were all admissible as evidence tending to show that the participators were co-conspirators. The acts and declarations of McDonald at the time show that he understood the purpose of the mob and participated therein; hence the evidence tended to show that he was a co-conspirator, and there was no error in its admission. The authorities before referred to are full in support of this holding.

³¹⁸ If McDonald engaged voluntarily in these unlawful acts, if he joined in with others to aid in the scheme, he became a co-conspirator, and the defendant was responsible for his acts, provided it were shown that the defendant was a conspirator with others, for the reason that McDonald's acts were in furtherance of the original design. "If a general conspiracy exists, you may go into general evidence of its nature and the conduct of its members, so as to implicate men who stand charged with acting upon the terms of it years after those terms have been established and who reside at a great distance from the place where the general plan is carried on. It is held that all who accede to a conspiracy after its formation and while it is being executed, become co-conspirators"; also that if parties concur in doing the act, although they were not previously acquainted with each other, it is a conspiracy: See *King v. Hammond & Webb*, 2 Esp. Cas. 719.

The following extract from the opinion in *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 17 N. E. 898, is in point: "Nor is it necessary to prove that the conspiracy originated with the defendants, or that they met during the process of the concoction; for every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties, before or afterward, in furtherance of the common design": 3 Greenleaf on Evidence, sec. 93.

One to be chargeable need not have been an original contriver of the mischief; for he may become a partaker in it by joining the others while it is being executed. If he actually concurs, no proof is required of an agreement to concur: 2 Bishop's New Criminal Law, sec. 190; 3 Chitty's Criminal Law, secs. 1141, 1143; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122.

Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the ³¹⁹ means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged.

"The prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus

prove the conspiracy: Roscoe's Criminal Evidence, 7th ed., 415." See, also, *Stewart v. Johnson*, 18 N. J. L. 87. Upon the same principle rest the Connecticut decisions, that any declaration made by one conspirator, pursuant to the common object and in furtherance of it, is admissible against all of them when the combination is once established: *Cowles v. Coe*, 21 Conn. 235; *Knower v. Cadden Clothing Co.*, 57 Conn. 202, 17 Atl. 580; *State v. Thompson*, 69 Conn. 720, 38 Atl. 868.

As we hold that there was some evidence tending to show the conspiracy alleged between the defendant and the Carpenters' Union, the testimony in relation to the action of Sanhegrin was admissible, which was in substance that he went out under promises from Howley who was a member of defendant lodge; that he went to the hall used by the defendant as a lodge-room, and that he was there paid fifty cents by Howley, which the latter received from Page.

The same reason applies to the testimony of Pennington in respect to his conversation with Loveland, also to the testimony of Patch as to his conversation with Young and Hines.

The defendant contends that all the evidence tending to show boycotting was inadmissible for the reason that the plaintiff could not recover damages for injuries thereby received by third persons. But we understand that the purpose of this evidence was to show that the plaintiff was directly injured to the extent to which the boycotting was carried into effect; for instance, if plumbers were not permitted to finish their work upon the boarding-house, the building could not be used for lodging and boarding the plaintiff's workmen; and ³²⁰ if stores were unable to supply the plaintiff's workmen with the necessaries of life, they could not continue in the plaintiff's employment, and thus the plaintiff was injured.

As all the testimony received under the defendant's exception, in our judgment, had some tendency to show the conspiracy claimed and the results of it and efforts made by the conspirators to make the strike effectual by preventing the plaintiff from employing other workmen, it cannot be insisted that there was error in respect to the order in the admission of evidence, for as was said in *Jenne v. Joslyn*, 41 Vt. 478, in the end all the evidence became per-

inent to the issue: *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 17 N. E. 898. 'The defendant's exceptions are not sustained.

2. On the first day of the trial counsel for the plaintiff gave the counsel for the defendant a written notice requiring the defendant to produce its charter, its constitution and by-laws, its books of records containing the reports of meetings and records of resolutions and votes, the appointment of committees, a list of the members of defendant lodge from May 20, 1902, to the commencement of the suit, and a list of its charter members and the record book. On the following day the plaintiff's counsel stated in open court that he had served such notice upon defendant's counsel, and that the books and papers called for had not been produced. The defendant's counsel then said that he had no authority to produce any such books and papers, that he knew nothing about them, and that the defendant was a secret organization. The court admonished him that notice to him was notice to defendant. A subpoena duces tecum was also served upon John F. Tait, the defendant's recording secretary, who had charge of the books and records of the defendant, to bring into court all the records, record-books, paper accounts, charters, resolutions, votes and roll-books of the defendant. Tait appeared in court but brought with him none of the books, records or papers called ³²¹ for. He stated that he had not read the subpoena and did not understand that he was required to produce the books and papers. He stated that he thought he could get them, and being excused by the court for that purpose, left the courtroom, but returned later stating that he had not got them, that they were not where he placed them two weeks before, and that the drawer where he kept them had evidently been opened and the books and papers taken out. The court thereupon ordered the defendant and its officers and agents to produce the books that had been called for, and stated the inferences that the law would draw from their nonproduction. Tait testified that he had had the custody of the books and records, and that the entire records had been taken away. On the day following this order the defendant's counsel was asked if he had the records in court, and he replied that he could only advise that they be produced, that he had so advised,

and that he could not personally produce them. Later, Tait was asked if he had made inquiries of John E. Capeless, the defendant's treasurer, and replied that he had not, and had not seen him since the trial began. A few days later Mr. Nourse, the defendant's president, testified that he heard the demand made on the first day of the trial for defendant to produce its books and records, but that he had not seen or learned anything about them since, and that he had not seen the treasurer; that on that day he and Tait had made search in the hall and ante-room and could not find the books and records. It was stated in court that a subpoena had been issued for Capeless, but that he could not be found, and the court held that the statement, in the circumstances, was proper. The plaintiff introduced Thomas Mullen as a witness whose testimony tended to show that he saw Charles T. McKean leave the machinists' hall a few nights before with a package about fourteen by ten inches and two inches thick, but that ³²² he did not know what was in the package; that it had the appearance of a book; that he had not seen McKean since that night; that he had attended a meeting of defendant lodge about four weeks previous in the defendant's hall and saw there the roll-book and the book of minutes, and described them as about ten by fourteen inches and perhaps an inch thick; that he had attended meetings of the defendant, and that the minutes of the meetings were recorded in the minute book referred to.

Similar efforts were made to obtain from T. C. Young, the recording secretary of Local No. 950 of the Brotherhood of Carpenters and Joiners, the production in court of all the books and records of resolutions, votes, appointment of committees and records of proceedings of that association, but Young produced only the record book of proceedings since January 1, 1903. Mr. Blue, who preceded Young as secretary, and in whose custody Young testified the books and records were left, was ordered to bring such books and records into court, but he testified that Young was the secretary and had the custody of the books and records of the Carpenters' Union. Young was sent in the custody of an officer to the place where he said the books were, but he returned and said he had brought with him all the books and papers he had found in the drawer. He

produced the record book from January to July, 1902, and plaintiff's counsel found among the papers a communication from the defendant dated May 31, 1902, announcing the strike and requesting the co-operation and assistance of the Carpenters' Union. This is plaintiff's exhibit 6. Young and Blue were afterward directed to make further search, but reported that they were unsuccessful in finding the books and records demanded.

A like effort was made to have the books of record of the Central Trades and Labor Council produced. Pennington testified that the council was composed of three delegates from ³²³ each of the several unions in Rutland and vicinity; that he was then secretary of Protection Lodge, which was one of those unions; that he had not brought the records into court; that he had not the custody of them, and that he did not know where they were and had not seen them since he turned them over to McKean the previous December. The plaintiff's counsel stated in court that subpoenas had been issued for McKean and Capeless but had failed of service. A like effort was made to obtain the records, books and papers of the Journeyman Barbers' Union, 215, with the same result.

3. The court complied with twenty of the defendant's twenty-five requests, and exceptions are insisted upon here only to the refusal to charge in accordance with two of the remaining five, which were: 1. "That the plaintiff cannot recover for any expense incurred by it in procuring other workmen to take the position of the men who left its service on May 20, 1902." 2. "That any threat made by the defendant or anyone associated with it to boycott any boarding-house keeper who entertained or any merchant who supplied with the necessities of life workmen in the employ of the plaintiff, if made directly and exclusively to such boarding-house keeper or merchant, was not an interference with or invasion of the rights of the plaintiff, and for such threats the plaintiff cannot recover."

These requests were not sound in law. As to the first, the correct rule was given to the jury—that so far as the plaintiff and the men whom it sought to employ to take the places of the strikers were left to their free choice, the plaintiff could not recover, though it suffered damage; but the court said that the request ignored one of the vital ques-

tions in the case—"whether the plaintiff was hindered or impeded in procuring men to take the places of the strikers, and was so hindered and impeded by the defendant lodge or by those ³²⁴ with whom it was in conspiracy, whether individuals or associations, and whether men desiring employment and desirous and willing to work for the plaintiff for the wages which they were offered and on the terms which they were offered, as to hours, etc., whether these men were kept from entering into that employment by coercion or intimidation or undue influence operating either upon the mind or upon the body, that element seems to be omitted. That request in terms the court cannot comply with."

As to the other request the court properly remarked that it "could not say that it is not an invasion of the rights of a free man for others acting in combination to employ threats and intimidation (to use the language of the request), for one man not to supply him with one necessity of life, and another man not to supply him with another necessity of life. The court cannot lay down that doctrine."

4. The defendant excepted to the compliance with the plaintiff's tenth request to charge, which reads: "If the jury find the conspiracy charged in the declaration, and that other labor unions in the conspiracy suppressed, concealed or destroyed their records to prevent their being introduced in evidence, the same presumption of guilt may be drawn from such suppression of their records, and the jury may find the facts charged in the declaration established by the presumption arising from the suppression of the records of a co-conspirator." The court evidently used the word "damages" inadvertently, for the word "facts" was used in the request, which was given to the jury verbatim, with the exception of the change of these words and the omission of the words "of guilt" which the court said should be omitted. It is apparent that the court intended to comply literally with the request, and the jury could not have understood that if they made a certain presumption they were to find the damages ³²⁵ claimed in the writ, for the court had instructed them that the burden of proof was upon the plaintiff to make out its case, and after giving the plaintiff's tenth request it was explained that the facts that men struck and went out, and that the plain-

tiff thereby suffered damage, did not entitle it to recover: that workmen might strike and go out and advise other men who were inclined to take their places, not to do so. In compliance with requests by both the plaintiff and the defendant, the court repeatedly charged that the plaintiff could not recover unless it showed that the injury suffered by it was caused wholly, or in part, by the unlawful act of the defendant, or of some or all of the associations or persons connected with it; that some unlawful means must have been used—an interference with or invasion of the legal rights of the plaintiff; that intimidation and coercion, either physical or moral, must have been employed by the defendant, or by others in the unlawful combination, to entitle the plaintiff to recover damages. The entire charge, except the expression referred to, was in accordance with the settled rules of law upon the subject of damages in such cases, and the jury could not have been misled. The use of the word “damages” by the court was so inconsistent with the theory of the entire charge upon the subject of damages, that we think it was the duty of counsel to have called the attention of the court to it. It was said by Veazey, J., in *Melendy v. Bradford*, 56 Vt. 148: “When a judge drops a word or expression, in the course of a long charge, contrary to its whole theory and so plainly error as to force the impression of inadvertence, it is the duty of counsel to call attention to it and not let it pass in reliance upon a general exception in the event of an adverse verdict”; and by Rowell, J., in *Fassett v. Roxbury*, 55 Vt. 552: “It is not profitable or salutary to look into a charge with a carping disposition, but it should be taken as a whole: ³²⁶ and although it may contain some expressions that, taken alone, would be error, yet if, as a whole, it breathes the true spirit and doctrine of the law and there is no fair ground to say that the jury has been misled by it, it ought to stand.”

The tenth request and instruction were correct. In 3 *Greenleaf on Evidence*, section 94, the rule is laid down that: “The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted, is, that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individu-

ality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by anyone in furtherance of that design, a part of the *res gestae*, and therefore the act of all": See *State v. Thibean*, 30 Vt. 100; 2 Russell on Crimes, Metcalf's ed., 572.

The fact of a common design, of an individuality of purpose existing between the different associations, provided the conspiracy were established, made the records of the other associations the records of the defendant. As the act of one co-conspirator was the act of all, so the records of one association were the records of all so far as they evidenced the unlawful combination. Indeed, no claim is made in the defendant's brief or argument that the other associations stood differently from it in respect to the nonproduction of their books and papers.

5. The plaintiff's evidence had tended to show that the defendant, having control of the books and papers called for by the plaintiff and ordered by the court to be produced, had refused to produce them in defiance of the order; that the reasons given for their nonproduction were frivolous and derisive; that the defendant and its officers stood before the court in the attitude of men who had spoliated or suppressed ³²⁷ evidence. The question is whether the court applied the correct rule of law in the instructions to the jury.

In charging upon this subject the court stated without objection that it had been shown that the defendant "had books, books of minutes," and that was treated as a fact in the case. The court, however, did not assume as a fact that the defendant might have produced the books, records etc., called for, but submitted that question to the jury. This language was used in the charge: "But you can easily see that if books are destroyed; if books are hidden; if books are carried away, the power of the court is limited in that respect. . . . But the arm of the law is long enough and strong enough to reach cases of that sort, and when the jury feel in a civil case, when they are satisfied by a fair balance of proof, fair balance of probabilities, that a party has suppressed books, has hidden books, has kept books away that have been called for and which it has had notice to produce, then the law says the jury may presume from the absence of those books and papers against the party

called upon to produce them, and not producing them, and in favor of the other party." Further on the court said: "If you find that the defendant, after being notified to produce books and papers, has failed to do so, you have a right to presume that it is because those books and papers would make against its claim and in favor of the claim of the plaintiff. . . . You can give to that presumption such weight as you think it ought to have. You may find or presume that the claim of the plaintiff is true and that the claim of the defendant is false, is untrue, if you find that the defendant has suppressed evidence which has been duly called for. In the view that the court takes of the matter, the weight of it rests with you." To these instructions the defendant excepted. (We think that, in the connection in which ³²⁸ it was used, the word "failed" was equivalent to refused, having the power to obey the order.)

The defendant contends that this was a literal application of the doctrine of *omnia praesumuntur in odium spoliatoris*; that the remarks of the court above quoted amounted to an instruction that, if the jury found that the books, had been destroyed or suppressed, they might presume, without other proof of the fact, that they contained evidence of the conspiracy. The jury could not have so understood it, for immediately after the above instructions were given the court explained what the claims of the parties were—the plaintiff's, that there had been coercion and intimidation resulting in damages—the defendant's, that it had only advised but made no attempt to interfere with the free choice and judgment of workmen. The court then remarked that the jury knew what the claims and evidence were on both sides and that he would not undertake to review the evidence in full. After thus stating the question to the jury, he told them that they must "consider what had been produced in evidence; that they knew the history of the case." He called attention to the fact that the defendant had not produced the books of the association after repeated notice to produce them—after it was shown that it had them; also to the "stickers" and circulars, and submitted to the jury to find whether they were signed by authority of the associations, whether the different associations were associated together, and, if these facts were found, whether these "stickers" and circulars

fairly represented the circumstances and situation at Rutland. In calling attention to different parts of the evidence the court repeatedly said to the jury: "It is for you to say." In complying with several of the defendant's requests, he charged, as before stated, that to entitle the plaintiff to recover, he must prove that he was ³²⁹ injured by some unlawful act of the defendant or its associates.

Taken together this fairly shows that the court charged the jury that if they found the defendant had suppressed the books and papers, they might find or presume the plaintiff's claim upon the evidence was true, and that the defendant's claim was false. It cannot be fairly said that the jury must have understood it to mean otherwise. If this is the fair meaning of the charge, and we think it is, the jury are presumed to have so understood it, and there was no error.

The rule of law governing this question was substantially complied with, which is, that the presumption arising from the fact of spoliation of evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden. It cannot supersede the necessity of other evidence. The presumption is regarded as merely matter of inference in weighing the effect of evidence in its nature applicable to the question in dispute: *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095.

6. After verdict and before judgment the defendant filed a motion that the verdict be set aside and a new trial granted by reason of the misconduct of a juror during the trial. Testimony was taken on both sides and the motion was fully heard by the trial court upon the testimony submitted and the motion was denied. The court filed no statement of facts, and therefore, under the decision in *Mullin v. Rowell*, 56 Vt. 301, the question is not before this court.

Judgment affirmed.

Start, J., dissents, holding that the exceptions to the charge should be sustained.

The Acts and Conduct of Employés amounting to conspiracy are discussed by the supreme court of Connecticut in the recent case of *State v. Stockford*, 77 Conn. 227, ante, p. 28. The legal aspects of boycotting are discussed at length in the monographic note to *Gray v. Building Trades Council*, 103 Am. St. Rep. 488-593. And strikes and strikers are discussed in the extended note to *O'Neil v. Behanna*, 61 Am. St. Rep. 706-711.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

RITTERHOFF v. PUGET SOUND NATIONAL BANK.

[37 Wash. 76, 79 Pac. 601.]

CANCELLATION OF FORGED INSTRUMENTS—Equity Jurisdiction.—Courts of equity have jurisdiction to cancel a forged joint note, although it is past due, where one of the apparent makers is an invalid. In such case there is danger of losing the evidence upon which the action is based before any adequate remedy at law, or under the statute, can be obtained. (p. 797.)

CANCELLATION OF FORGED INSTRUMENTS—Parties.—If two out of three of the apparent makers of a joint note seek to have it canceled on the ground that their signatures thereto were forged, the legal representatives of the third maker, since deceased, are proper, but not necessary, parties. (p. 797.)

Carr & Preston, for the appellant.

R. H. Lindsay, for the respondents.

⁷⁷ CROW, J. This is an action in equity to enjoin appellant from asserting any demand against respondents, or either of them, upon a certain pretended promissory note, ⁷⁸ or in any manner transferring or indorsing the same. The complaint, which was verified on February 12, 1904, in substance alleges that the plaintiff, William Ritterhoff, is an unmarried man, a resident of Seattle, King county, Washington; that he has been, at all the times mentioned in the complaint, and still is, an invalid, suffering from paralysis; that he owns real and personal property within King county, Washington, of the reasonable value of seventy-five thousand dollars; that plaintiff, Lena Krug, is a widow, and has real and personal property within King county, Washington, of the value of seven thousand dollars; that ever since the fifteenth day of

January, 1903, the said defendant has been, and still is, asserting that it of right has and holds a certain claim and demand against said plaintiffs for the sum of five thousand dollars, by virtue of a pretended promissory note, purporting to be executed by one Adolph Krug, now deceased, and also by the said plaintiffs, William Ritterhoff and Lena Krug, as joint and several makers, and that said note is now in the possession of the defendant; that said defendant, by written notice, has, prior to the commencement of this action, demanded payment of said note from plaintiffs, and from each of them; that the names of plaintiffs, as appearing on said pretended note as their signatures, are each of them false, fraudulent, and forgeries, and that plaintiffs did not, nor did either of them, ever execute, or authorize the execution of, said note; that prior to the commencement of this action, plaintiffs, and each of them, notified defendant that, as to them and each of them, said pretended note was false, fraudulent, and a forgery, and that, notwithstanding said notification, said defendant still claims to hold said note as a valid demand against said plaintiffs and each of them; that said plaintiffs never, at any time, received any consideration for said pretended note. Plaintiffs also allege danger of irreparable damage, ⁷⁹ that they have no speedy or adequate remedy at law, and pray equitable relief as above stated.

To this complaint appellant interposed a general and special demurrer, which being overruled, appellant elected to stand upon its demurrer, and declined to plead further. Thereupon a decree was rendered in accordance with the prayer of the complaint, adjudging said note, as against respondents, to be false, fraudulent, a forgery, and null and void, and forever enjoining and restraining appellant from asserting any demand against respondents, or either of them, upon said pretended note, and from transferring or dealing with said pretended note, as against respondents, or either of them. From said final judgment and decree this appeal is taken.

The only ground of demurrer seriously urged upon this appeal is that the complaint does not state a cause of action. Appellant contends a court of equity has no jurisdiction, for the reason that respondents have an adequate remedy at law—urging that, from the facts alleged in the complaint, it clearly appears that, as soon as appellant shall bring its action upon said note, it will only be necessary for respondents

to deny the execution of the note, and thereupon appellant will be put upon proof of the genuineness of the disputed signatures.

For the purposes of the demurrer it is admitted that the pretended signatures are forgeries. It does not clearly appear from the complaint that the note has matured, although possibly its maturity may be inferred by reason of demand for payment having been made. Appellant urges that a forged note is void, always and everywhere; that it cannot bind the alleged maker, in the hands of a bona fide purchaser, either at common law or under our statute (Laws 1899, p. 345, sec. 23); that the note is past due, and, even if genuine, has passed the day of innocent ⁸⁰ purchase; that therefore, drawing proper deductions from the allegations of the complaint, the note in suit can never be collected from respondents, and that, in the event appellant should attempt to collect it from them by action at law, they would have nothing to do but deny its execution.

In defining the jurisdiction of courts of equity, it is a well-established principle that equity will not relieve when there is a full, adequate and complete remedy at law. To deprive such courts of jurisdiction, it is not sufficient that there may be some remedy at law which may be enforced, at some indefinite time in the future, but such remedy must be plain, adequate and complete.

“In general, courts of equity will not assume jurisdiction where the powers of the ordinary courts are sufficient for the purposes of justice. And, therefore, it may be stated as a general rule, subject to few exceptions, that where the plaintiff can have as effectual and complete a remedy in a court of law as in a court of equity, and that remedy is direct, certain and adequate, a demurrer, which is in truth a demurrer to the jurisdiction of the court, will hold. But where there is a clear right, and yet there is no remedy in a court of law, or the remedy is not plain, adequate and complete, and adapted to the particular exigency, then and in such cases courts of equity will maintain jurisdiction”: Story’s Equity Pleading, 10th ed., sec. 473.

“The remedy at law which precludes relief in equity must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity”: Fletcher’s Equity Pleading and Practice, sec. 208. See, also, Boyce’s Exrs. v. Grundy, 3 Pet. 210, 7 L. ed. 655.

The supreme court of Indiana, in the case of *Otis v. Gregory*, 111 Ind. 511, 13 N. E. 42, says: ⁸¹ "Whatever may have been formerly held in other jurisdictions in respect to the cancellation of void contracts, the doctrine that a party to an instrument, which is of no legal force or validity whatever, may ask the aid of a court of equity in procuring its surrender and cancellation, is now fully set at rest here. It is regarded as against conscience that one party should persist in holding a deed or other instrument against another of which he can make no possible use except as a means of embarrassing his adversary: 1 Story's Equity Jurisprudence, sec. 700; 3 Pomeroy's Equity Jurisprudence, sec. 1377."

What is the practical effect of the remedy at law which appellant contends respondents have in this action? Simply to permit present conditions to remain entirely undisturbed, to allow appellant to continue holding said note against respondents as a possible cause of action at law, to sue or not sue thereon as it (appellant) may elect, to keep or dispose of said note at appellant's pleasure while respondents await an indefinite opportunity at some future time to interpose the defense of forgery in an action at law commenced by appellant, or its possible assignee.

From the allegations of the complaint it appears that respondent Ritterhoff is in poor health. Death is liable to come to any person, at any time, and more immediate liability exists in the case of an invalid. Respondents' estates may become involved by reason of this note. Adolph Krug, one of the alleged joint and several makers, is now dead, and his evidence can never be obtained. Other evidence, now available and in existence, may be forever lost. Respondents' credit may be continuously affected, or injured, by reason of the existence of this claim; for appellant, at its election, may continue to hold the note and assert a claim thereon for an indefinite period, and then commence an action at law for its enforcement immediately prior to such time as the note would be barred ⁸² by the statute of limitations. Under such circumstances would respondents have, at all times, a plain, adequate, and complete remedy at law, accompanied by a prompt administration of justice? If they would, the court had no equitable jurisdiction, and the demurrer should have been sustained. If not, there was no error in overruling the demurrer.

Appellant cites numerous cases, placing special reliance upon the following: *Shenehon v. Illinois Life Ins. Co.*, 100 Ill. App. 281; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. ed. 174; *Trimble v. Minnesota Thresher Mfg. Co.*, 10 Okla. 578, 64 Pac. 8; *Geer v. Kissam*, 3 Edw. Ch. 129. In *Shenehon v. Illinois Life Ins. Co.*, 100 Ill. App. 281, an equitable action was brought for the purpose of compelling the cancellation and surrender of two life insurance policies. It appeared, however, that the assured had died prior to the commencement of the action; that the policies claimed to have been fraudulently obtained were in the possession of the beneficiary; and that, under the terms of said policies, suit would have to be instituted within one year from the date of death of the assured, or action thereon would be barred. At the time of the commencement of the action, substantially one-half of this period had expired. It being therefore evident that an action at law upon the policies would have to be commenced within six months, or be barred, the court held it had no equitable jurisdiction to compel the surrender and cancellation of the policies, and thereby deprive the beneficiary of the right to a trial by jury.

In *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. ed. 174, an action in equity was commenced by the town of Grand Chute, in Wisconsin, to compel the cancellation of certain bonds. It appeared, however, that at the time of the filing of the bill in equity, an action at law had already been commenced on ^{ss} the bonds, by the holders thereof; and it was properly held that a court of equity had no jurisdiction.

In *Trimble v. Minnesota Thresher Mfg. Co.*, 10 Okla. 578, 64 Pac. 8, an action in equity was commenced for the purpose of securing the surrender and cancellation of certain notes, given by the plaintiff to the defendant, a manufacturing company, for the purchase price of certain machinery. The plaintiff claimed said notes to have been fraudulently obtained, but did not deny their execution, nor allege defendant to be insolvent. Under these circumstances the court held it had no equity jurisdiction. We think that case does not, in the facts involved, at all resemble the one at bar.

In *Geer v. Kissam*, 3 Edw. Ch. 129, it was held that although equity may have a right to decree the surrender of a promissory note, yet, where an action has been brought upon said note, and a bill is filed to aid discovery, and such discovery is given, and the case appears to be such that the

party complainant has a defense at law, and evidence to support it, an injunction which restrained such action at law will be dissolved. Counsel for appellant also cites the case of *Field v. Holbrook*, 14 How. Pr. 103, in which Duer, J., makes the following analysis of the circumstances under which a court of equity will act, in ordering instruments in writing to be delivered up and canceled: "1. When the plaintiff alleges that the instrument which he prays may be surrendered or canceled is void upon grounds of which a court of equity alone can take cognizance; in fewer words, when he sets up a purely equitable defense; 2. When the instrument is a deed or other document concerning real estate, which, although inoperative if suffered to remain uncanceled, would throw a cloud upon the plaintiff's title to the lands which it embraces, or to which it refers; 3. When the instrument is negotiable in its character, as a bill of exchange, and the putting it into circulation by the holder would be a ⁸⁴ fraudulent act; 4. Where the plaintiff claims to have a defense valid in law, but which rests upon evidence which he is in danger of losing, if the adverse party is suffered to delay the prosecution of his claims."

In our opinion, the fourth subdivision above stated is amply sufficient to confer equity jurisdiction in this case. It is easy to understand how respondents may be in danger of losing evidence should the adverse party be suffered to delay prosecution of its claims.

Appellant contends that no case is made by the complaint, showing a probable loss of evidence, and that even if the facts were otherwise, ample protection is afforded respondents to anticipate any such possibility by perpetuating testimony, in the manner provided by Ballinger's Code, sections 6034 to 6038. While it is true that the sections referred to provide a method by which testimony of any witness may be taken and perpetuated for future use, nevertheless, we think they do not afford respondents all relief to which they are entitled. There is no provision in said statute giving authority to require the production of the note in question, and even if such production could be obtained, it is apparent from the nature of the anticipated defense against said note that testimony of the respondents, taken under said statute, would not be as effective in establishing forgery as would the oral evidence and the personal presence of the parties whose purported signatures appear on the note. In any event, though satisfactory

testimony could be perpetuated, we think respondents should not be compelled to submit to the delay and annoyance of having a fraudulent note outstanding, and constantly urged against them as a valid claim, with no certainty as to when an action may be commenced thereon.

Under the peculiar facts of this case, as shown by the allegations of the complaint, respondents did not have ⁸⁵ any remedy at law, as practical and efficient, to the ends of justice and its prompt administration, as their remedy in equity. The lower court had equitable jurisdiction, and properly overruled the general demurrer: *Sharon v. Hill*, 20 Fed. 1; *Sharon v. Terry*, 36 Fed. 337, 13 Saw. 387, 1 L. R. A. 572; *New York etc. R. Co. v. Schuyler*, 17 N. Y. 592; *Huston v. Roosa*, 43 Ind. 517; *Fuller v. Percival*, 126 Mass. 383.

Appellant, in its special demurrer, urges a defect of parties defendant, and assigns error thereon, insisting that the personal representatives of Adolph Krug, deceased, are necessary parties to the adjudication sought in this action. It is contended by respondents that this question was not raised in the lower court. While this perhaps may be true, such fact does not properly appear in the record. We are of the opinion, however, that while the representatives of Adolph Krug, provided he left an estate and any such representatives have been appointed and qualified, might be proper parties to the action, they are not necessary parties.

We find no error in the record, and the judgment of the superior court is therefore affirmed.

Mount, C. J., Dunbar and Rudkin, JJ., concur.

Root, J., not voting.

Hadley and Fullerton, JJ., took no part.

The Jurisdiction of Equity to decree the cancellation of forged instruments is discussed in *Vannatta v. Lindley*, 198 Ill. 40, 92 Am. St. Rep. 270, and note. The general rule is often laid down, but perhaps not always strictly adhered to, that equity will not entertain a suit to cancel a writing when there exists an adequate remedy at law: See *County of Ada v. Bullen Bridge Co.*, 5 Idaho, 188, 95 Am. St. Rep. 180; *Fitzmaurice v. Mosier*, 116 Ind. 363, 9 Am. St. Rep. 854, and note.

STATE v. BROWN.

[37 Wash. 97, 79 Pac. 635.]

CONSTITUTIONAL LAW—Dentist's License.—A statute requiring an examination by, and license from, a state dental board, as a prerequisite to "owning, running, or managing a dental office, or department," is unconstitutional and void as an unwarrantable infringement of a natural property right, and as not being a legitimate exercise of the police power of the state. (p. 801.)

POLICE POWER—Dentistry.—The health, moral or physical welfare of the public, or any of the personal or property rights of its individuals, are not endangered by the ownership and management of a dental office, so long as those employed therein to do the actual dentistry are qualified and licensed as by law required. Hence, an owner or manager of a dental office cannot be required to take out a license as a prerequisite to carrying on the business of dentistry, as such manager. (p. 803.)

J. R. Parker, for the appellant.

S. R. Stern, for the appellee.

⁹⁷ ROOT, J. Appellant was prosecuted upon an information charging him with "the crime of owning, running and managing a dental office or department in the state of Washington, without a license," in violation of an act ⁹⁸ of the legislature approved March 18, 1901, commonly known as the "dental law," and found at pages 314 to 318, of the published Session Laws of 1901. The portions of said act involved in this case are as follows:

"Sec. 4. Any person or persons seeking to practice dentistry in the state of Washington, or to own, operate or cause to be operated, or to run or manage a dental office or place for the practice of dentistry in the state of Washington after the passage of this act shall file his or her name, together with an application for examination, with the secretary of the state board of dental examiners, and at the time of making such application shall pay to the secretary of the board a fee of twenty-five dollars, and to present him or herself at the first regular meeting thereafter of said board to undergo examination before that body. No person shall be eligible for such an examination unless he or she shall be of good moral character and shall present to said board his or her diploma from some dental

college in good standing and shall give satisfactory evidence of his or her rightful possession of the same.

“Sec. 8. Any person who, as principal, agent, employer, employé, or assistant, who in any manner whatsoever shall practice dentistry or who shall own, run, operate or cause to be operated, or manage a dental office or headquarters in the state of Washington without having first filed for record and had recorded in the office of the auditor of the county wherein he shall so practice or do such act, a certificate from said board of dental examiners as herein provided, shall be deemed guilty of a misdemeanor.

Sec. 11. All persons shall be said to be practicing dentistry within the meaning of this act who shall contrary to this act for a fee or salary or other reward paid either to himself or to another person for operations or parts of operations of any kind, treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof, or who shall own, run, or manage a dental office or department in the state of Washington, without registering and procuring the license as herein provided.”

From a judgment of conviction, he appeals to this court.

Appellant contends that this statute is unconstitutional, and especially that portion requiring a license from the state board of dental examiners as a prerequisite to “owning, running or managing” a dental office or department. The validity of this statute, in so far as it requires a license from said board before one may “treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof,” has been heretofore upheld by this court: *State v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110; *In re Thompson*, 36 Wash. 377, 78 Pac. 899. These decisions sustain the statutory requirements for the “practice of dentistry,” as that expression is commonly understood, and as it is mentioned in section 4 of the act above quoted, where the disjunctive “or” shows it to be clearly distinguished from the expression “to own, operate or cause to be operated, or to run or manage a dental office or place for the practice of dentistry,” which follows.

The question is now presented as to the power of the legislature to enact a law requiring an examination by, and license from, the state dental board, as a prerequisite to “owning, running and managing a dental office or de-

partment.” Appellant contends that this is an unwarrantable infringement of a natural and constitutional right. Respondent maintains that it is justifiable as a legitimate exercise of the police power of the state. It will be conceded, we apprehend, that the portion of the law in question cannot be sustained, unless by virtue of the police power. This requires a consideration of the purpose, nature and extent of that power. Courts and text-book writers have found it difficult to accurately define this power, and we find their conceptions of it expressed in varied forms. This court in the case of *State v. Carey*, 4 Wash. 424, 30 Pac. 729, speaking through Dunbar, J., quotes approvingly from the case of *Lake View v. Rose* ¹⁰⁰ Hill Cemetery, 70 Ill. 191, 22 Am. Rep. 71, where the court referred to this subject as “that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society.” Speaking of it in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, Mr. Justice Field, at page 87, said: “That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society. . . . But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the constitution intended to secure against abridgement.”

In *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, the supreme court of the United States, speaking through Mr. Justice Strong, said: “The state may protect the lives, limbs, health, comfort and quiet of all persons and their property.” From these and the many adjudicated cases touching the subject, the proposition is deducible that the police power may curtail the rights of the individual in so far as, and no further than, the free exercise thereof is calculated to infringe upon the rights of others. Ordinarily, a natural and constitutional personal right or privilege may be limited only when its free exercise threatens or endangers the moral or physical well-being of others, or their property; and rights and privileges concerning property may be circumscribed under like circumstances, or when the public, or some portion thereof, has an interest or is concerned in the use thereof. The police power does not justify the withholding from one individual of a nat-

ural privilege or right, in order that a corresponding advantage may be added to the rights or privileges of another. The restriction is permissible only as a preventive of evil results reasonably to be expected without such limitation. Russell on Police Power, pages 34, 35, says: ¹⁰¹ "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

The foregoing quotation is the language of the supreme court of the United States in *Lawton v. Steele*, 152 U. S. 137, 14 Sup. Ct. Rep. 499, 38 L. ed. 385. See, also, *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220. Our constitutions, both federal and state, are jealous of the rights of the individual, and will permit of their abridgment only where the same is essential to the well-being and rights of others. In the case of *State v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110, this court, speaking through Hadley, J., said: "It is of the highest importance to the state that suffering and afflicted humanity shall not be subjected to the care and treatment of unlearned and unskilled persons. In its effort to prevent such a misfortune to its people, the state may adopt a standard for the test of fitness to engage in the work of what should be a learned profession."

The reasoning and conclusion thus set forth, applied as they were to the "practice of dentistry," as commonly understood, are incontrovertible. But are the reasons therein assigned applicable to a statute requiring an examination by, and license from, a dental board before one may "own, run or manage" a dental office? Does the police power authorize the enactment of a statute making this requirement? We feel constrained to hold that it does not. It is solicitude for the physical well-being of the public, or that portion that may need dentistry work, which justifies that part of the statute providing for the examination and licensing of those who desire to "treat diseases or lesions of ¹⁰² the human teeth or of jaws or correct malpositions thereof." To perform such work with safety and proper regard for health and comfort, the operator must

possess technical knowledge and skill peculiar to the study and practice of dentistry. Can the same be said of one desiring to "own, run or manage" a dental office? We think not.

To own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist. To illustrate: Suppose a man thoroughly qualified and legally licensed as a dentist should die, leaving a perfectly and completely equipped dental office to his widow, who knew nothing of dentistry and was incapable of securing a license. By continuing to "own" this property any appreciable time she would become liable to prosecution, under this part of the statute. Can the police or any other power be constitutionally invoked to produce such a result? We are led to believe not. Let us carry the illustration a little further. The widow, not being able to sell the dental office to advantage, decides to hire competent and legally licensed dentists to treat patrons of the office, and undertakes the management herself, paying bills, collecting accounts, arranging credits, making appointments, and doing other acts necessary to the supervision and control of the business affairs of the concern. Then she becomes a criminal, if this portion of the statute have virtue, because she has "managed a dental office." And yet, it will scarcely be contended that any of these acts injuriously affect "the health, good order, morals, peace, or safety" of society, or menace "the lives, limbs, health, comfort, quiet or property" of the patients treated in such office. Many similar illustrations will readily occur ¹⁰³ to the mind given to the contemplation of the natural results reasonably to be anticipated under the operation of such a statute.

A consideration of the province of the police power, in the light of constitutional rights, would seem to show, beyond controversy, that in the enactment of this portion of the statute the legislature transcended its authority. Should the owner or manager hire operators not legally qualified, or should they participate in the treatment or operations mentioned in the other portion of the statute, they would, of course, be amenable to and punishable under those pro-

visions. But we are unable to say or perceive that the health, moral or physical welfare of the public, or any of the personal or property rights of its individuals, are endangered by the ownership and management of a dental office, so long as those employed therein to do the actual dentistry work are qualified and licensed as by law required.

In the case of *In re Aubrey*, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, this court held unconstitutional an act of the legislature requiring horseshoers to pass an examination. In the opinion the following language occurs: " 'Liberty,' in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

And the court quotes from the case of *Allgeyer v. Louisiana*, 165 U. S. 589, 17 Sup. Ct. Rep. 427, 41 L. ed. 832, where the supreme court of the United States employed similar language in a like holding. In *People v. Warden of Prison*, 157 N. Y. 116, 68 Am. St. Rep. 763, 51 N. E. 1006, 43 L. R. A. 264, the court of appeals of New York held unconstitutional a statute prohibiting ¹⁰⁴ a person from selling railroad tickets unless employed by a transportation company. In the opinion Mr. Justice Parker said: "It is novel legislation, indeed, that attempts to take away from all the people the right to conduct a given business, because there are wrongdoers in it." It was held that the legislature has not the power to interdict the sale of a valid ticket by one person to another upon the pretext that fraud will thus be prevented.

Judge Brannon, in his book, "The Fourteenth Amendment," at page 200, says: "While guarding the public right and welfare, we must not forget the person's right; we must not submerge the right of the individual in the ocean of public right. . . . All men are free by nature. They have certain inalienable rights, says the Declaration of Independence. When they enter into the body politic they do not give up these rights. . . . They have right of life, right of property, and, with the aid of property as a handmaid, to earn a livelihood in their own ways, not harming

others. They have right to labor, right to contract, right to do business. These are rights of liberty inhering and sheltered by the word 'liberty,' expressed in the constitution. Legislation for the high public behest of public safety and welfare can justly detract from those rights, but not otherwise. No call but a necessary public want can do so." See, also, *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; *Tiedeman on State and Federal Control*, 13 et seq., 482; *Tiedeman on Limitations of Police Power*, 194 et seq., 277-281; *Cooley on Torts*, 277; *People v. Caldwell*, 168 N. Y. 671, 61 N. E. 1132; *In re Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218, 31 Pac. 245, 24 L. R. A. 195; *Noel v. People*, 187 Ill. 587, 79 Am. St. Rep. 238, 58 N. E. 616, 52 L. R. A. 287; *Black on Constitutional Law*, 2d ed., 471 et seq.

Congress has enacted statutes requiring masters, mates, and engineers of various vessels to pass examinations and ¹⁰⁵ procure licenses before engaging in the work of their respective avocations. But we are unaware of any such prerequisite for one seeking to own a ship or manage its business. Druggists who compound medicines must have a license, but this is not essential to ownership of a drug store. The owner complies with the statute when he hires a duly licensed pharmacist to attend to the matters requiring a knowledge of drugs, medicines and poisons. Had the "ownership" of ships or drug-stores been deemed a menace to the health, safety or welfare of those patronizing either, examinations and licenses would doubtless have been provided for. But the necessity for such requirements evidently never occurred either to Congress or the legislature. Yet the reasonableness and legality of such prerequisites could be more readily upheld than those involved in the case at bar. Mr. Tiedeman, in *Limitations of Police Power*, page 277, says: "But it is a judicial question, whether the particular occupation or trade can, under the constitutional limitations, be restrained": See, also, *State v. Namias*, 49 La. Ann. 618, 62 Am. St. Rep. 657, 21 South. 852; 22 Am. & Eng. Ency. of Law, 2d ed., 931 et seq.; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

We feel that a court should be reluctant to pronounce a statute invalid, except where its plain duty impels such action. Conceiving this to be such a case, we are led to

declare that part of the statute requiring an examination and license in order to "own, run or manage" a dental office or department void.

Appellant contends that the information is insufficient, and alleges numerous errors as to rulings upon the reception, exclusion, and sufficiency of evidence. These matters become immaterial in view of our conclusion as to the validity of the statute.

Respondent moves to strike appellant's brief upon the ¹⁰⁶ ground that it does not contain a correct statement of the case, and does not contain references to the transcript. The brief contains some references, but should have more. However, the record and transcript are short, and our view of the law has rendered it unnecessary to make an extended examination of them. The motion will be denied: *Froelich v. Morse*, 15 Wash. 636, 47 Pac. 22.

The judgment of the honorable superior court is reversed, and the case remanded, with instructions to dismiss the action.

Mount, C. J., Rudkin, Dunbar, and Crow, JJ., concur.

Hadley and Fullerton, JJ., took no part.

For a Recent Decision in support of the principal case, see *Schnaier v. Navarre Hotel etc. Co.*, 182 N. Y. 83, 108 Am. St. Rep. 790.

ROLLER v. ROLLER.

[37 Wash. 242, 79 Pac. 788.]

PARENT AND CHILD—Tort by Parent—Action by Child.—
A minor child cannot sue his parent for damages arising upon a tort committed by the parent against such child while the relation of parent and child exists. (p. 807.)

PARENT AND CHILD—Rape by Parent—Action by Child.—
A parent is not civilly liable to his child for a rape committed upon her by him during her minority, and while the relation of parent and child, with its mutual obligations, existed. (p. 809.)

H. McLean, for the appellant.

Gable & Seabury and Million & Houser, for the respondent.

243 DUNBAR, J. The defendant was convicted of the crime of rape, committed upon his minor daughter, Lulu Roller, and was sentenced to a term in the penitentiary at Walla Walla. This action was commenced by the said Lulu Roller for the purpose of recovering from said defendant damages for said rape, in the sum of two thousand dollars, and the homestead of the defendant, upon which the minor children of the defendant were residing, was attached. The said Lulu Roller, at the time of the commencement of this action, was fifteen years old. The homestead in dispute was the community property of Roller and his deceased wife, Emma Roller. The defendant interposed a demurrer to the complaint of the plaintiff, on the ground that it did not state facts sufficient to constitute a cause of action, in that the plaintiff, being the minor child of defendant, living with him and unemancipated, had no right to sue for a tort committed by the parent upon the child. Motion was made to discharge the attachment, (1) because the land was the homestead exempt under the state law, and (2) because the land was exempt under the federal statute, which exempts such property from debts contracted before the issuance of the patent. The motion to discharge the attachment was overruled. Upon the trial of the cause, judgment was entered in favor of the plaintiff for the sum of two thousand dollars.

It is assigned that the court erred in overruling the demurrer of the appellant to the amended complaint of the respondent, and in overruling the motion to dissolve the attachment. It is the contention of the appellant that a minor child cannot sue a parent for damages arising upon tort, that such actions are against public policy, and not permitted by the law. The rule of law prohibiting suits between parent and child is based upon the interest that society has in preserving harmony in the domestic relations, an interest which has been manifested since the earliest organization ²⁴⁴ of civilized government, an interest inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state.

This view, in effect, is not disputed by the respondent, who admits the general proposition that the domestic re-

lations of the home and family fireside cannot be disturbed by the members thereof, by litigation prosecuted against each other for injuries, real or imaginary, arising out of these relations; but he asserts that the law has well-defined limitations, and that every rule of law is founded upon some good reason, and the object and purpose intended to be attained must be looked to, as a fair test of its scope and limitations; that, in the case at bar, the family relations have already been disturbed, and that, by action of the father, the minor child has, in reality, been emancipated; that the harmonious relations existing have been disturbed in so rude a manner that they never can be again adjusted; and that, therefore, the reason for the rule does not apply.

There seems to be some reason in this argument, but it overlooks the fact that courts, in determining their jurisdiction or want of jurisdiction, rely upon certain uniform principles of law, and if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation which can be drawn; for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort. The principle permitting the action would be the same. The torts would be different only in degree. Hence, all the disturbing confusion would be introduced which can be imagined under a system which would allow parents and children to be involved in litigation of this kind.

Outside of these reasons which affect public policy, another ²⁴⁵ reason, which seems almost to be *reductio ad absurdum*, is that, if a child should recover a judgment from a parent, in the event of its death the parent would become heir to the very property which had been wrested by the law from him. In addition to this, the public has an interest in the financial welfare of other minor members of the family, and it would not be the policy of the law to allow the estate, which is to be looked to for the support of all the minor children, to be appropriated by any particular one.

At common law it is well established that a minor child cannot sue a parent for a tort. It is said by Cooley on Torts, page 276, under the title of "Wrongs to a Child": "For an injury suffered by the child in that relation no

action will lie at the common law." And this has been held to be analogous to coverture, where a husband or wife is forbidden to sue the other spouse for torts or wrongs committed upon them to their damage during coverture, even refusing the action after the relation, by a divorce, has ceased to exist. See *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27, which is simply an expression of the universal law on that subject. See, also, *Bandfield v. Bandfield*, 117 Mich. 80, 72 Am. St. Rep. 550, 75 N. W. 287, 40 L. R. A. 757.

Mr. Schouler, in his work on Domestic Relations, section 275, after discussing the proposition of filial relations, says: "With reference to a blood parent, however, all such litigation seems abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household. An unkind and cruel parent may and should be punished at the time of the offense, if an offender at all, by forfeiting custody and suffering criminal penalties, if need be; but for the minor child who continues, it may be for long years, at home and unemancipated, to bring a suit, when arrived at majority, free from ²⁴⁶ parental control and under counter-influences, against his own parent, either for services accruing during infancy or to recover damages, for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. The courts should discourage such litigation."

This text goes beyond the circumstances of the case at bar, where the action was brought during the minority of the plaintiff. As will be seen by the extract above quoted, it is even forbidden after the child becomes of age, if the injury sued upon is referable to the period of minority. So well is this principle of the law understood that there have been very few attempts to inaugurate actions of this kind. The only one to which we are referred by brief of counsel, or which we have been able by independent investigation to discover, which seems to be in point, is *Hewlett v. George*, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682, where it was held that a parent is not civilly liable to a child for personal injuries, inflicted during minority, and where the relation of parent and child with its mutual obligations exist. This was an action by the daughter against the

mother for wrongful incarceration in an insane asylum, and was brought after the marriage of the daughter who, at the time of the alleged injuries, was separated and living away from her husband—a much stronger case, it will be seen, in favor of entertaining an action, than the one at bar, so far as the relations of the parties were concerned. The court, in refusing the remedy, said: “The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand.”

247 There being no authority at common law for such an action, and it not being claimed that there is any statutory provision for an action of this kind, we are of the opinion that the action should not have been entertained, and that the demurrer to the complaint should have been sustained. This conclusion renders unnecessary a discussion of the other questions involved.

The judgment is therefore reversed, with instructions to the lower court to sustain the demurrer to the complaint.

Mount, C. J., Hadley, and Fullerton, JJ., concur.

Rudkin, Root and Crow, JJ., took no part.

Decisions on the Civil Liability of Parents for personal injuries inflicted on their minor children appear to be very few. According to the text-writers, and the decision of at least one court, as will be seen from an examination of the principal case, the policy of the law seems to be opposed to any such liability.

DIXON v. NORTHERN PACIFIC RAILWAY COMPANY.

[37 Wash. 810, 79 Pac. 943.]

RAILROADS—Freight Brakemen—Ejection of Trespassers—Presumption.—A freight brakeman on a railroad train is presumed to have authority to eject trespassers therefrom, and the burden of proof is upon the railroad company to show lack of actual or implied authority. (p. 816.)

RAILROADS—Authority of Freight Brakemen to Eject Trespassers—Evidence.—It is within the general authority of a brakeman on a freight train to remove trespassers who get, or attempt to get, thereon, and if, in so doing, he does not exercise care and caution, but acts wantonly or maliciously, and an injury results, the railroad company is liable without evidence showing the brakeman's authority. (p. 817.)

EVIDENCE—Res Gestae.—If a trespasser is wrongfully ejected from a freight train, his statement, made five minutes afterward and while in great pain, as to the manner in which he was ejected from the train, is admissible in evidence as part of the res gestae. (p. 818.)

EVIDENCE—Res Gestae—Hearsay.—A statement made by a stranger at the time and place of an accident, as to the manner in which it occurred is not admissible in evidence as part of the res gestae, but is mere hearsay, in the absence of any showing that he was prompted by the circumstances to tell the truth. (p. 819.)

B. S. Grosscup and A. G. Avery, for the appellant.

Troy & Falknor, for the respondent.

³¹¹ DUNBAR, J. This action was brought in behalf of one Dixon, to recover damages for the alleged wanton and willful act of a brakeman in kicking him from a moving train, resulting in injuries necessitating the amputation of his arm. Dixon was a boy about eighteen years old, and was beating his way on a freight train from Portland to Tacoma, riding on the bumpers six or seven cars back from the engine. The train reached Centralia about 2 o'clock in the morning of July 3, 1903, stopped a few minutes, and then pulled out. After going two or three hundred yards from the depot, a brakeman came over the cars, and asked Dixon if he had any money, and, being told that he had none, swore at him and told him to get off. He answered that the train was going too fast, and he could not get off, and the brakeman said, "Now, you son of a b——, get off," and thereupon stepped on his fingers (Dixon was holding on the car ladder), and kicked him loose, kicking him on the head and shoulders several times. By reason of such treatment, he was forced

to let go of his hold on the ladder, and fell down on the track, the wheels of the car running over his arm, and mangling it so that amputation was necessary. This was the testimony of Dixon, which was denied by the train men, but was a question that was ³¹² submitted to the discretion of the jury, and may be considered a fact established in the case. Upon trial, the jury brought in a verdict for plaintiff in the sum of nineteen hundred and ninety-nine dollars.

It is assigned that the court erred, (1) in denying defendant's motion for nonsuit, made at the close of the testimony; (2) in denying defendant's motion for a new trial made upon the ground, among others, that the evidence was insufficient to justify the verdict, and that the verdict was against the law; (3) in allowing the witness Scheelke and the witness Reisinger to testify, over the objection of defendant, to statements made by plaintiff after the accident, to the effect that "that son of a b—— of a brakeman kicked him off the train"; and (4) in refusing to allow the witness Shields to testify to statements made to him by a stranger, at the time and place of the accident, as to the manner in which it occurred.

The question involved in the first and second assignments, which are argued together in appellant's brief, raises the question of the responsibility of a railroad company for the wanton and willful act of a brakeman, resulting in injury to a trespasser, in the absence of evidence showing that the brakeman's act was within the scope of his employment. It is earnestly contended by the respondent, with some degree of reason, that this question cannot be raised in this court by the appellant, it not having been raised in the lower court. With the view we take of the merits of the case, it is not necessary, in the respondent's interest, to discuss this question, and we mention it only to prevent the claim which might be made in some future case that, under the doctrine of this case, the court had retreated from the position, which it has uniformly taken; that a case must be tried in this court upon the same theory on which it was tried below; but inasmuch as the merits involve an important question, which is sure to rise at some ³¹³ future time, we have concluded to enter upon a discussion thereof.

Of course, there is no question but that there is a sharp distinction drawn by the authorities between passengers and trespassers on a railroad car, but the distinction is as to the duty owing by the company, and not as to tortious acts com-

mitted on either passenger or trespasser. A high degree of care on the part of the company is exacted by the law, to insure the safety of the passenger who has, for a mutual consideration, placed himself in the care and under the charge of the company. To this degree of care the trespasser is, of course, not entitled, for he has no contractual relation with the company, and cannot therefore plead, as can a passenger, that there is an implied provision in the contract that the company has employed suitable servants to run its trains. Standing as a naked trespasser, the company is not bound to consider his interests in the selection of its servants or in the performance of its business in any way.

But notwithstanding this distinction, the law, out of regard for common humanity, will not permit a master to allow his servant to unnecessarily abuse or imperil the life or limb even of a trespasser, and if the company, through its servants, willfully injure him, it will be liable, even though he may have been guilty of contributory negligence. It is well settled, generally, that a railroad company is responsible in damages to a trespasser for torts committed upon him by a servant who, in the commission of the tort, is acting in the line of his employment, and within the scope of his authority—not within the scope of his authority as applied to the commission of the tort, for no authority for such commission could be conferred, but within the scope of his authority to rightfully do the particular thing which he did do in a wrongful manner. And while the master ³¹⁴ will not be held liable for the willful act of the servant not done to further or protect the master's interest, or with a view to the master's service, if the servant is authorized to perform the duty, but in the performance of that duty acts willfully or negligently to the detriment of another, the master will be held liable. So that the pertinent question in this case is, Was the brakeman acting within the actual or implied scope of his employment when he committed the act complained of?

Upon this question there is a great conflict of authority, many courts, as asserted by the appellant, holding that it is not within the implied authority of a brakeman to expel trespassers from the company's trains, but that their business, as their name implies, is to attend to the brakes on the cars. Many of the authorities cited by appellant, while discussing incidentally the question involved here, are based upon other principles, and are not of value in determining this question;

and others, notably the text-books, simply undertake to give an expression to the general current of authority. Thus, the appellant's citation from Patterson on Railway Accident Law, that the general rule is that, in order to render the railroad liable for the act of the servant, it must also be shown that the particular act which caused the injury was within the scope of the servant's employment, is of little value, for the question here is whether the act committed was within the scope of the servant's employment impliedly. It will not be contended anywhere that the railroad would be liable if the servant was acting entirely without the actual or implied scope of authority, and upon an independent proposition not connected with the master's business. The same author, however, on page 109, after discussing this proposition and citing some cases holding in favor of appellant's contention, says: "The doctrine of most of the cases, however, is that ³¹⁵ wherever a railway servant is put in charge of any property of the railway, as a station master in charge of a station, or a conductor in charge of a train, or an engine-driver or fireman in charge of an engine, or a brakeman in charge of a car, that servant is necessarily charged with the duty of protecting that particular property, and he is, therefore, for that purpose vested with an implied authority to remove trespassers therefrom; and if he makes a mistake, either by removing a person who is rightfully therein or thereon or by using unnecessary violence in the removal of a trespasser, the railway must be held liable for all such injuries as result, in the one case from the removal, and in the other case from the unnecessary violence with which that removal is effected."

It is further said, on page 110: "The doctrine of the last-mentioned class of cases seems to be sound, for if the person who does the wrongful act be, in fact, a servant of the railway, and if the act be done in furtherance of the general purposes of the railway, and not to accomplish an independent personal purpose on the part of the servant, the railway ought to be held liable therefor, on the ground of an implied delegation to the servant of authority for the performance of the particular act."

There are, however, many cases cited by the appellant which hold directly that a brakeman is not within the actual or implied scope of his authority or employment when ejecting a trespasser from a train. The most pointed and strongest case on this question, among others, is *Farber v. Missouri*

Pac. R. Co., 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350, where it was held that it cannot be assumed, in the absence of proof, that a brakeman on a freight train was authorized to remove a trespasser. And also *Stringer v. Missouri Pac. R. Co.*, 96 Mo. 299, 9 S. W. 905; *Galaviz v. International etc. R. Co.*, 15 Tex. Civ. App. 61, 38 S. W. 234; *Texas etc. R. Co. v. Mother*, 5 Tex. Civ. App. 87, 24 S. W. 79; *Texas etc. R. Co. v. Moody* ⁸¹⁶ (Tex. Civ. App.), 23 S. W. 41; *Illinois Cent. R. Co. v. Latham*, 72 Miss. 32, 16 South. 757; *Marion v. Chicago etc. R. Co.*, 64 Iowa, 568, 21 N. W. 86; *Towanda Coal Co. v. Heeman*, 86 Pa. St. 418. There are other cases holding substantially to the same doctrine, but those above mentioned are exactly in point, being brakeman cases; and the doctrine of those cases is, that it is well established, as a matter of rule and of common observation, that the conductor is in control of the cars, and that it is his duty to see that the cars are protected from trespassers; that it is the brakeman's duty to exercise this control only when he is authorized by the conductor to do so; and that, in the absence of proof of such authorization, he will not be regarded as acting within the scope of his authority.

There is, however, another line of authorities, most of which are of a more recent date, holding that it is a matter of common knowledge and observation, of which courts will take judicial notice, that it is the duty of a brakeman to exercise supervisory control over the cars, a control which includes within its limits the right to protect the cars by ejecting trespassers therefrom; and we are inclined to yield our allegiance to this doctrine. It must be evident to everyone who travels on railroad trains that, while it may be true, theoretically, that the conductor is in charge of the cars, his special duties are more of a business character; that he looks out for the business of such train—if a passenger train, for the collection of fares and the proper exercise of the duties of the company toward passengers; if of a freight train, for the proper handling and transmission of freight, and for the direction of the movements of the train in a general way.

The business of a brakeman, while it may have originally been restricted to the operation of brakes, has grown into a supervision, to a certain extent, of the cars. He ⁸¹⁷ meets you upon the platform, when you start to enter a car, and will not permit you to enter until he individually sees to it that passengers who desire to alight from the cars have

alighted, thereby preventing the confusion and jostle incident to the unrestricted egress and ingress of the passengers; and if a passenger were to insist upon disobeying his orders in this respect, and the brakeman assaulted him sufficiently to protect the interest of the company in carrying out his orders, we have no doubt that he could successfully plead the exercise of his duties in defense of the assault, in any court in the Union. He is found looking after the doors of the cars, to see that they are open at the proper time and closed at the proper time, and the ventilation of the cars. He will be seen in the performance of his duties on the top of the cars, where this brakeman was, and it is a fact notorious that he is exercising supervisory powers over the cars. It may be that these powers have increased with the changing conditions incident to railroading, and that the observation of this increase in his powers is the cause of the change in judicial decision on this question; for it is noticeable that most of the cases holding to the theory that the brakeman is not acting within the scope of his authority or employment, when ejecting a trespasser from the train, were decided many years ago, while the great majority of the cases holding to the other doctrine are of modern announcement. While this authority, of which we have been speaking, may not be strictly conferred upon the brakeman by the terms of the employment contract, we think that it must be a matter of common observation that such authority is an inference from the nature of the business, and its actual daily exercise.

In addition to this, the rule for which the respondent contends places the burden of proof where it justly belongs, viz., upon the railroad company, which has the knowledge³¹⁸ of its contractual relations with its servants, and can show lack of actual or implied authority, or usage or custom, which would raise the presumption of implied authority, if such authority or custom does not exist in the management of its business; while the party who is injured has not the benefit of this knowledge, and can only judge of who is in authority on a railroad train by appearances. Railroad employes as a rule are dressed in certain garbs that distinguish them as railroad men, and when a demand is made upon a passenger, or even upon a trespasser, by one of these men so distinguished, the presumption is that he speaks with authority, and the other party has no way of determining that he does not, except at his peril. It would be an impracticable thing

to ask of a person, when a demand is made upon him by a brakeman, in regard to something which was connected with the business of the operation of the train, that he should go the length of a train to find a conductor to ask him if the employé with whom he was in controversy had authority to make the demands which he was making. So that no injustice can be done the railroad company in holding, as many of the cases do hold, that in case of a brakeman ejecting passengers, whether trespassers or otherwise, the burden is upon the railroad company to show lack of actual or implied authority. Sustaining this view of the law, the respondent cites many authorities, among which is Baldwin's American Railroad Law, page 254, where the rule, under the title "Brakemen," is thus tersely stated: "It is prima facie within the implied authority of a brakeman, whether on a passenger or a freight train, to put off any person who is found upon it without right; and if he does this at an improper place or in an improper manner, whereby such person is unnecessarily injured, the company is liable, even if the act were wanton and reckless, ³¹⁹ provided it were not done to accomplish an independent, malicious purpose of his own." This is a new work, issued in 1904.

In *Smith v. Louisville etc. R. Co.*, 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72, it was held that a brakeman on a railroad train, as well as the conductor, is conclusively presumed to have authority to eject trespassers or intruders, and if he uses unnecessary violence in doing so, the company is responsible for the injury resulting. And in that case it is said: "The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience."

In *Hoffman v. New York Cent. etc. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337, it is held that the conductor of, or a brakeman upon, a railroad passenger train has authority to remove, in a lawful manner, a trespasser upon the platform of a car, whether the authority is conferred by the rules of the company or not; it is implied and is incident to his position. It is within the scope of the general authority of a brakeman on a freight train to prevent trespassers from getting on the train, and to remove such persons who wrongfully get thereon; but if, in so doing, he does not exercise care and caution, but acts wantonly or maliciously, and an injury results, the

railroad company is liable: *Kansas City etc. R. Co. v. Kelly*, 16 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172.

In *Lang v. New York etc. R. Co.*, 51 Hun, 603, 4 N. Y. Supp. 565, a case where a boy without authority got upon a train, and the brakeman told him to get off, the boy refused to do so, and the brakeman threw a lump of coal on the top of the car which struck the boy on the head, whereupon he fell from the car under the wheels and lost his foot, it was held that the brakeman was engaged in the master's business and acting within the general scope of ³²⁰ the authority conferred upon him. In the opinion it is said: "It is not necessary to show specific order to brakeman, by the master, to drive off boys who were 'stealing a ride.' The brakeman was engaged in the master's business, and acting within the general scope of the authority. . . . The brakeman was apparently engaged for the defendant, and clearly was not pursuing his own purpose."

"It is within the scope of the implied authority of a brakeman in charge of a freight train to eject trespassers therefrom": *O'Banion v. Missouri Pac. R. Co.*, 65 Kan. 352, 69 Pac. 353.

In *McKeon v. New York etc. R. Co.*, 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329, a case decided November 18, 1902, it was held that a railroad company is liable to a boy who, when stealing a ride on the front platform of the baggage-car of a passenger train, is recklessly pushed from the car by a brakeman of the company, while the train is in motion, and is injured by falling under it; that it is within the scope of the authority of a brakeman on a passenger train to remove, in a lawful manner, from the platform of a baggage-car, one who is riding there for the purpose of evading his fare. In the course of the opinion, it is said: "A conductor has implied authority by virtue of his employment to eject a trespasser from the train under his control [citing *Ramsden v. Boston etc. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200, and cases cited]. An engineer would probably have like authority to eject a trespasser from his engine. A brakeman has less authority than either. His duties primarily relate, as his name implies, to the management of the brakes. But common observation shows that on passenger trains they embrace much more, that so far as the management of the brakes on such trains is concerned, their duties have been largely superseded by the appliances in use. On passenger trains ³²¹ brakemen

are required to look after the safety and comfort of the passengers, to protect the property of the company, and to see that fares are not evaded. The rules of the defendant company as well as common observation show this. And while the brakeman in question was not in any just sense a conductor or even a subconductor, we think that the jury were warranted in finding, as they must have found under the instructions of the judge, that it was within the scope of his authority to remove the plaintiff in a lawful manner from the platform if he was there for the purpose of evading his fare."

In *Hill v. Baltimore etc. R. Co.*, 78 N. Y. Supp. 134, 75 App. Div. 325, decided October 10, 1902, it was held that, where a brakeman on a railroad train, in order to eject one stealing a ride, uses an unreasonable method, calculated to increase the trespasser's danger, and such action is the proximate cause of an injury, the railroad is liable. To the same effect are *Chesapeake etc. R. Co. v. Anderson*, 9 Am. & Eng. R. R. Cas., N. S., 136; *Johnson v. Chicago etc. R. Co.*, 116 Iowa, 639, 88 N. W. 811; *Bjornquist v. Boston etc. R. Co.*, 185 Mass. 130, 102 Am. St. Rep. 332, 70 N. E. 53; *Johnson v. Chicago etc. R. Co.*, 123 Iowa, 224, 98 N. W. 642, a case decided February 20, 1904, and many other cases too numerous to mention.

The testimony complained of in assignment No. 3, viz., that of the witness Scheelke and the witness Reisinger, to statements made by the plaintiff after the accident, to the effect that the brakeman kicked him off the train, we think was plainly admissible under the doctrine of *res gestae*; that it was a spontaneous, impulsive statement of fact, while the boy was suffering intense and excruciating pain, and under the excitement of the accident, when the natural prompting would be to speak the truth. The testimony was to the effect that they heard somebody crying for help; that they ran down and found Dixon alone, holding his ³²² arm and crying; that it was between five and ten minutes after the accident occurred, and that, when asked what had happened, the answer above stated was given. This we think was sustained under the rule announced by this court in *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111, and *Lambert v. La Conner etc. Transp. Co.*, 30 Wash. 346, 70 Pac. 960.

It is also urged by the appellant that, if the court was warranted in admitting, as a part of the *res gestae*, the testimony

of these two witnesses, it committed error in refusing to allow the witness Shields to testify to statements made to him by a stranger, at the time and place of the accident, as to the manner in which it occurred. But we think the court did not abuse its discretion in this respect. There is no showing that the stranger, who was not able to be found at the trial, was in any way connected with the accident, or prompted by any circumstances to speak the truth in regard to it, and under the circumstances, it seems to us that it would simply be the admission of hearsay testimony.

There being no error discoverable in the record, the judgment is affirmed.

Mount, C. J., Hadley and Fullerton, JJ., concur.

Rudkin, Root and Crow, JJ., took no part.

If a Brakeman Pushes a Trespasser from a train in a wanton and reckless manner, the railway company is answerable for the injuries sustained: *McKeon v. New York etc. R. R. Co.*, 183 Mass. 271, 97 Am. St. Rep. 437. See, too, *Enright v. Pittsburg etc. R. R. Co.*, 198 Pa. St. 166, 82 Am. St. Rep. 795; *Pollack v. Pennsylvania R. R. Co.*, 210 Pa. St. 631, 105 Am. St. Rep. 843; *Bjornquist v. Boston etc. R. R. Co.*, 185 Mass. 130, 102 Am. St. Rep. 332. And if an engineer unlawfully expels a trespasser from his locomotive, the railway company is liable: *Polatty v. Charleston etc. Ry. Co.*, 67 S. C. 391, 100 Am. St. Rep. 750.

IN RE CLIFFORD.

[37 Wash. 460, 79 Pac. 1001.]

APPEAL—Review of Findings.—If no exceptions are taken to findings, the only question before the appellate court is their sufficiency to support the judgment. (p. 820.)

JUDGMENT of Adoption—Collateral Attack—Res Judicata.—The validity of a decree of adoption litigated and determined in a collateral habeas corpus proceeding by a court of competent jurisdiction, is res judicata in a subsequent proceeding between the same parties to vacate such decree of adoption. (p. 821.)

JUDGMENTS—Collateral Attack—Res Judicata.—If a judgment is attacked in a collateral proceeding, and the adverse party waives the form of attack, and the issues are determined by a court of competent jurisdiction, such determination is binding and conclusive, unless set aside in some manner authorized by law. (p. 822.)

W. H. White and J. J. Burt, for the appellant.

Sweeney & Steiner, for the respondents.

⁴⁶¹ RUDKIN, J. On the twentieth day of January, 1904, the petitioner sued out a writ of habeas corpus from the superior court of King county, to obtain the custody and control of his minor daughter, Alice B. Clifford. The defendants, Herbert O. Williams and Grace E. Williams, made return to said writ, claiming the right to the custody and control of said minor by virtue of a decree of adoption, theretofore entered in the superior court of said county, and for other reasons not material to be stated here. At the hearing had on the writ and the return thereto, the court dissolved the writ, and awarded the care and custody of said minor to the defendants above named. On the eighth day of January, 1904, the petitioner filed in the superior court of said county his petition, praying that the order or decree of adoption, theretofore entered in said court on the twelfth day of November, 1903, whereby the said minor was adopted by the defendants herein, be ⁴⁶² vacated and set aside. The defendants filed their answer to said petition to vacate, and, upon the hearing had thereon, the court made the following finding: "That on or about the twentieth day of January, 1904, the petitioner, Peter A. Clifford, filed in the superior court of the state of Washington, for King county, in the cause No. 41,727 entitled 'Peter A. Clifford, petitioner, v. Herbert O. Williams and Grace E. Williams, his wife, respondents,' a petition praying for habeas corpus for the purpose of bringing the body of Alice B. Clifford before the court to abide such order as the court might direct. That all the issues raised in the petition to set aside the decree of adoption now under consideration were raised in said petition for a writ of habeas corpus; that to said petition for a writ of habeas corpus respondents made a full and complete return, and that upon said petition and return and the issues thereby raised, a full and complete hearing was had in said superior court on the twentieth day of January, 1904; that all the matters and things including the validity of said decree of adoption, were raised and fully presented to the court in said cause No. 41,727, and by said court, passed on and adjudicated; that the parties before the court in

said cause No. 41,727 were identical with the parties now before the court; that no new facts have since arisen, and that the issues now before the court are in consequence of said proceedings in cause No. 41,727 *res adjudicata*."

And the petition was accordingly dismissed. From the order of dismissal, this appeal is taken. No exception was taken to the above finding, and, therefore, the only question before this court is the sufficiency of said finding to support the order appealed from: *Montesano v. Blair*, 12 Wash. 188, 40 Pac. 731; *Fremont Milling Co. v. Denny*, 12 Wash. 251, 40 Pac. 1062; and numerous other cases in this court. If the validity of this decree or order of adoption was directly in issue in another proceeding, between ⁴⁰³ the same parties, in a court of competent jurisdiction, and the validity of such order or decree was there adjudicated and determined, it would seem to require no argument to show that such adjudication was binding upon the parties to this proceeding, and that the judgment of dismissal was properly entered.

"It is a fundamental and unquestioned rule that a former judgment, when used as evidence in a second action between the same parties or their privies, is conclusive upon every question of fact which was directly involved within the issues made in such former action, and which is shown to have been actually litigated and determined therein": *Black on Judgments*, 2d ed., sec. 609.

"There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision": *Freeman on Judgments*, 4th ed., sec. 249.

"The principle is recognized and supported in most of the American cases, that a decision upon any material point is conclusive, though the subject matter of the two suits is different": *Freeman on Judgments*, 4th ed., sec. 253.

"By the rules of the civil as well as of the common law, '*res judicata* is not changed by a change in the form of action.' It is not material that the form of action be the

same, if the merits were tried in the first': Freeman on Judgments, 4th ed., sec. 255.

"The principle of *res judicata* is also applicable to proceedings on habeas corpus, so far at least as they involve an inquiry into and a determination of the rights of conflicting claimants to the custody of minor children. The decision on a former writ is conclusive in a subsequent application, unless some new fact has occurred which has altered the state of the case or the relative claims of the ⁴⁶⁴ parents or other contestants to the custody of the child in some material respect. The principles of public policy requiring the application of the doctrines of estoppel to judicial proceedings, in order to secure the repose of society, are as imperatively demanded in the cases of private individuals contesting private rights under the form of proceedings in habeas corpus as if the litigation were conducted in any other form. Otherwise, as is well stated in the opinion of Senator Paige, 'such unhappy controversies as these may endure until the entire impoverishment or death of the parties renders their further continuance impracticable. If a final adjudication upon a habeas corpus is not to be deemed *res adjudicata*, the consequence will be lamentable. This favored writ will become an engine of oppression, instead of a writ of liberty'": Freeman on Judgments, 4th ed., sec. 324.

It is no answer to say that the decree or order of adoption was attacked collaterally in the habeas corpus proceedings. Parties are estopped to take inconsistent or contradictory positions in courts of justice: Black on Judgments, 2d ed., sec. 632. The rule that a judgment cannot be attacked in a collateral proceeding is a rule of policy and convenience. The parties for whose benefit the rule exists may waive it. If a judgment is attacked in a collateral proceeding, and the adverse party waives the form of attack, and the issues are determined by a court of competent jurisdiction, such determination is binding and conclusive upon the parties, unless set aside in some manner authorized by law. Neither party will thereafter be heard to say that the second judgment is not binding, because it was brought about by a collateral attack upon the first. The conclusion at which we have arrived renders it unnecessary that we should go further

into the history of this unhappy family. The record in this case demonstrates the wisdom of the rule we have been discussing.

A Decision on Habeas Corpus respecting the custody of an infant is generally considered conclusive on a subsequent application for the writ, unless some new fact has occurred which alters the status of the case: *In re Sneden*, 105 Mich. 61, 55 Am. St. Rep. 435; *State v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854. Compare, however, the case of *In re King*, 66 Kan. 695, 97 Am. St. Rep. 399, where it is held that, notwithstanding the determination in a previous proceeding by habeas corpus of the right to the custody of a child, another court may make a different order respecting the custody, if satisfied that the interests of the child require, although no material change in the circumstances is shown.

YAKIMA VALLEY BANK v. McALLISTER.

[37 Wash. 566, 79 Pac. 1119.]

BILLS AND NOTES—Indorsement by Fraud—Bona Fide Holder.—If the maker of a note payable to himself is induced by a fraudulent trick to indorse it, he being ignorant of the fact that he has indorsed it, and without having any intention to indorse it, he is not liable thereon, even to a bona fide holder for value. (p. 826.)

FRAUD—Evidence of.—It is competent to show a general scheme to defraud, so connected with the case under consideration, by time and circumstance, that it will have a tendency to raise the presumption that the fraud charged was a part of the general scheme so proven. (p. 827.)

BILLS AND NOTES—Indorsement by Fraud—Evidence.—If the maker of a note payable to himself alleges in defense that his indorsement thereof was procured by a fraudulent trick, without intent on his part to indorse it, evidence of the perpetration of a similar trick on others, by those who obtained his indorsement, is admissible, even against a bona fide holder of the note, to show a general scheme to defraud. (pp. 827, 828.)

EVIDENCE.—Erroneous Admission of Evidence is Cured by expressly withdrawing from the jury any consideration of the issue upon which it was introduced. (p. 830.)

BILLS AND NOTES—Exclusion of Evidence.—If the maker's indorsement of a note is denied, expert evidence offered only in rebuttal as to the genuineness of the signature is not admissible, the burden of proof being upon the plaintiff to establish the genuineness of such signature as part of his case in chief. (p. 830.)

APPEAL.—Heated Expressions of Counsel in the argument of a case do not generally justify a reversal of the judgment. (p. 831.)

Snyder & Preble, for the appellant.

⁵⁶⁸ DUNBAR, J. This action was brought by the Yakima Valley Bank, a corporation, against the respondent, upon a promissory note for seven hundred and ninety dollars and twenty cents, dated November 20, 1902, signed on the face thereof by the defendant, Charles McAllister, payable to the order of said Charles McAllister, and purporting to bear his indorsement upon the back thereof. The complaint is the ordinary complaint for recovery upon a negotiable promissory note; alleges execution and delivery of the note by defendant to one J. B. Pugsley, and the transfer before maturity to plaintiff, for a valuable consideration, in the ordinary course of business. The answer denies the execution of the note, and alleges, by way of affirmative defense, that the note was without consideration, in that it was signed on the face thereof by the said defendant in the sum of seven hundred and ninety dollars and twenty cents, the amount of the annual premium upon a ten thousand dollar life insurance policy upon defendant's life, which said Pugsley and one E. R. Place, associated with Pugsley in business, agreed to thereafter deliver to defendant, upon the express understanding ⁵⁶⁹ between defendant, and said Pugsley and Place that the note was not to be binding, and was to be returned to defendant, if, upon an examination of the said policy, defendant would not accept the same, and that defendant did not accept said policy; that the defendant did not intend to sign his name upon the back of said note, but that, as a part of said transaction with Pugsley and Place, he signed his name to a contract releasing the insurance company from liability, in case of his death while said policy was in his custody for inspection, and before he had accepted it, and that, in signing said contract, his signature penetrated through the paper upon which said contract was written, and appeared as an indorsement on said note. This is the substance of the answer. The answer, however, also alleged that the plaintiff had notice of the infirmity of the note, before it paid for the same. This was denied by the reply of the plaintiff. Upon these allegations the case went to trial.

The testimony of the defendant was to the effect that Pugsley and Place solicited him to take insurance in the Home Mutual Life Insurance Society, of New York City,

and that he agreed to take a policy for ten thousand dollars on the condition that, when he had examined the policy and had submitted it to his legal advisers, it corresponded with the representations made by the solicitors, and that he was to have until the first day of January to determine, the application being made upon the 20th of November, 1902; that the solicitors or agents of the company represented to him that it would be necessary for him to draw up a note, payable to himself and signed by himself, as an earnest of his intention to do business with the company, and that it was also necessary for him to sign a contract releasing the company from liability to him, in case he should die before the final consummation of the contract, they representing to him that the note could not be collected from him without ⁵⁷⁰ an indorsement, and that he would be safe in giving them the note; that the transaction occurred in the corral of a farm in Yakima county; that he was instructed to sign the application and the release, and that he did so; that a book with several papers upon it, placed there with the ostensible purpose of making it smooth, was handed him to write upon, and a fountain pen furnished by the agents, with the instruction to bear on hard as the pen was stiff; that he was afterward informed by the bank, the plaintiff, that they had purchased a note signed by him in the sum of seven hundred and ninety dollars and twenty cents, in favor of himself and indorsed by him on the back thereof. This indorsement he denied having made, his theory being that, by the fraudulent manipulation of the solicitors, the ink had been transmitted through the agreement which he signed, onto the back of the note, which had been placed there for the purpose of receiving the signature, and that he knew nothing about the note having been indorsed until he was notified by the bank, admitting that the signature was his, or very much like his, and alleging that it was a trick and a fraud; insisting that the signature had been obtained through the perpetration upon him of a trick and a fraud, and that it was not in fact his signature. Judgment was rendered in favor of the defendant.

A demurrer was interposed to the affirmative answers of the defendant, which was overruled, and the action of the court in overruling the demurrer is the first error

assigned—the appellant contending that the allegations of fraud do not amount to a denial that the defendant indorsed the note; that the answer, in legal effect, admits the execution of the note, and at most only tenders issue as to its validity; that the charges of mala fides are not distinctly set forth, so that plaintiff may know the charges he has to meet; and that, if the note was indorsed through the physical act of the defendant, he is responsible for the ⁵⁷¹ payment of the note, and for the results of that physical act to an innocent purchaser. This we think is not the law under any authority. It is not the physical act which constitutes a transaction of this kind, but it is the intention of the parties to the contract. It is true that, if a party, by any negligent act, is the cause of an investment made by an innocent person on the strength and credit of that act, he cannot escape liability; but if the matters set forth in the answer are true, there was no action on the part of the defendant at all, so far as indorsing the note was concerned. The indorsement was the effect of a fraudulent device and trick, which the defendant was in no way responsible for.

Several succeeding assignments are based upon the action of the court in admitting, over the objection of the appellant, the testimony of numerous witnesses to the effect that Pugsley and Place had perpetrated, in the judgment of the witnesses, the same fraud upon them in like transactions. It was testified by witnesses O'Neil, Purdin, Kandle and Chamberlain that, during the same month in which this transaction with respondent occurred, these solicitors had obtained their indorsement of notes in the same manner, and under the same circumstances, which were related on the witness-stand by the respondent; and it is noticeable that there was a similarity of methods in each instance. The business was not transacted as it ordinarily is in a house or upon a table, but the plan was to obtain these signatures out of doors, by the buggy in which these men traveled, and in each instance, with one exception, the signatures were written upon a pocket-book with documents and papers on top of it, under circumstances that would not be as liable to challenge the attention of the parties signing as would the interposition of the note under the agreement signed upon a table. In each instance these

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parties swore that they did not indorse the note which ⁵⁷² they had made out to themselves, and knew nothing about their having executed such a note until notice came to them to that effect from the bank, and that they had paid the notes rather than risk a lawsuit with the company, in many instances the notes being small.

It is insisted by the appellant that this testimony was inadmissible, and reliance is placed upon the case of *McKay v. Russell*, 3 Wash. 378, 28 Am. St. Rep. 44, 28 Pac. 908; and it might appear at first blush that that case was in point in favor of appellant's contention. In that case, which was an action to recover money paid upon a contract for the sale of real estate, on the ground that the sale was procured by fraudulent representations, it was held that it was inadmissible to show that, in a similar transaction prior thereto, defendants had made like misrepresentations to another party. But an examination of that case fails to show that there was any testimony offered that would show a general scheme connecting the transaction, which it was sought to prove, with the transaction which was in issue in the case. It is no doubt true, as a general proposition, that testimony tending to show that a person has committed another crime is not admissible for the purpose of showing the probability of his commission of the crime charged. But it is equally true that it is competent to show a general scheme to defraud, so connected with the case under consideration, by time and circumstances, that it will have a tendency to raise the presumption that the fraud charged was a part of the general scheme so proven. This court held, in *Oudin v. Crossman*, 15 Wash. 519, 46 Pac. 1047, that, in an action to recover a sum of money which plaintiff had been induced to pay for the purchase of a mine, in reliance upon false representations of the defendants, evidence was admissible showing that the defendants had made representations to other parties than plaintiff, and to people in the vicinity generally, regarding ⁵⁷³ the existence and character of the mine and the value of its ores, such representations being part of one continuous scheme or transaction for the purpose of selling the mine to anyone that could be induced to buy. And so, in this case, the testimony, if true, showed conclusively a general scheme to perpetrate this particular kind of a fraud

upon the people of a certain neighborhood at the same time, for the purpose of selling them insurance policies. The rule is thus clearly announced in 14 American and English Encyclopedia of Law, second edition, pages 196 and 197: "A charge of fraud in a particular transaction cannot be proved by evidence of other and independent frauds of the party charged, though in a similar transaction, unless it appears that there is such a connection between the transactions as to authorize the inference that the frauds are both parts of a general scheme or purpose to defraud. . . . If the other fraud as to which evidence is offered is similar in character to the fraud alleged, and so connected with the transaction under investigation in point of time and otherwise as to reasonably authorize the inference that both frauds were in pursuance of a general scheme or purpose to defraud in such cases, the evidence is admissible. This is well settled as a general rule, though in its application there is not entire unanimity in the cases. The chief reason for admitting evidence of other frauds in such a case is that, where transactions of a similar character by the same party are closely connected in time, the inference is reasonable that they proceed from the same motive."

The supreme court of the United States has spoken plainly on this proposition in *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. Rep. 877, 29 L. ed. 997. Suit was brought by an assignee of a policy of life insurance, obtained on the application of the assured at the instigation of the assignee, to recover of the insurers, after the death of the assured; and the defendants set up that it ⁵⁷⁴ was plaintiff's purpose, in procuring the insurance to be obtained, to cheat and defraud defendants, and offered to show that he effected insurances upon the life of the assured in other companies at or about the same time, for the like fraudulent purpose; and it was held that the testimony was admissible. In the course of the opinion, it is said: "A repetition of acts of the same character naturally indicates the same purpose in all of them; and if, when considered together, they cannot be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act"; citing *Butler v. Watkins*, 13 Wall. 456, 20 L. ed. 629, where it was said: "In actions for fraud, large lati-

tude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct toward another, at about the same time and in relation to a like subject, was actuated by the same spirit." This case also cites many cases in support of this view of the law. We think that, while it is difficult to apply the rule to varying circumstances, the circumstances surrounding these transactions, as shown by the testimony, bring the case squarely within the rule that testimony tending to show a general scheme to perpetrate a fraud is admissible.

But even if the admission of this testimony had constituted reversible error, it was cured by the instructions of the court, which we think were more favorable to the appellant than they should have been. After the conclusion of the testimony the court, evidently taking the view of the law that this testimony could not be admitted, as against a bona fide purchaser of the note, instructed the jury as follows: "This case has been tried upon two theories, and evidence has been received here by the court in support of each ⁵⁷⁵ theory. Part of the testimony received here, in the opinion of the court, is entirely competent in support of one of these theories, but it is incompetent in support of the other theory. These two theories are these: 1. That the plaintiff in this action was a bona fide holder of the promissory note in suit; and 2. That the plaintiff was not a bona fide holder of the promissory note in suit." Then the court proceeds to state what a bona fide holder is, and says: "Under the admitted facts in this case, I charge you as a matter of law that the plaintiff in this action is a bona fide holder of the note in suit."

Continuing, the court says: "Certain testimony was received here tending to show that other notes were received by these parties by the same means. In the opinion of the court this testimony was competent as tending to show that the note was obtained by fraud and without consideration. But these questions of fraud and failure of consideration the court now withdraws from you, and I charge you, as a matter of law, that you cannot consider in this trial the testimony relating to the other acts, if any, committed in this case. In other words, proof tending to show other forgeries, or tending to show the obtaining of other notes under like circumstances, is not competent as to whether this note was or was not in-

dorsed, and you cannot consider it in that light. The only question that I will submit to you, as I have stated, is the one in answer to the question as to whether this defendant indorsed his name on the back of this note."

It is alleged that the court erred in that part of the instruction quoted above, viz.: "In the opinion of the court this testimony was competent as tending to show that the note was obtained by fraud and without consideration." But a glance at the instructions in the record shows that the court withdrew this testimony from the consideration of the jury by withdrawing from their consideration the question of fraud and failure of consideration, as affecting ⁵⁷⁶ a bona fide holder. We will not specially review the alleged errors in refusing to instruct, for we think the instructions of the court, as given, covered the whole case, and were favorable to appellant. Nor did the court err in refusing to admit the so-called expert testimony in relation to the genuineness of the signature. The signature had been denied by the answer, and the burden, under such circumstances, was upon the plaintiff, in its case in chief, to prove the signature, and being offered only in rebuttal it was not competent. Nor do we think that the somewhat heated expressions of counsel in the argument of the case would justify a reversal of the judgment.

No discernible error appearing in the record, the judgment is affirmed.

Mount, C. J., Hadley and Fullerton, JJ., concur.

Rudkin, Root and Crow, JJ., took no part.

A Note to which the Maker's Signature has been procured by false representations as to the character of the paper, he being ignorant of its true character, and having no intention to sign such a paper, and being guilty of no negligence in doing so, is regarded by some authorities as void, even in the hands of a bona fide purchaser: Keller v. Ruppold, 115 Wis. 636, 95 Am. St. Rep. 974; Willard v. Nelson, 35 Neb. 651, 37 Am. St. Rep. 455. Compare the notes to Bedell v. Herring, 11 Am. St. Rep. 309-326; Willard v. Nelson, 37 Am. St. Rep. 458-460; and see Lally v. Terrell, 95 Me. 553, 85 Am. St. Rep. 433; Manhattan Sav. Inst. v. New York Nat. Ex. Bank, 170 N. Y. 58, 88 Am. St. Rep. 640; Chicago etc. Ry. Co. v. Hamblar, 215 Ill. 525, 106 Am. St. Rep. 187.

PERKINS v. BAILEY.

[38 Wash. 46, 80 Pac. 177.]

LIMITATION OF ACTIONS—Mortgages—Absence from State.

The statute of limitations does not run against a mortgagor, holding the legal title, during his absence from the state, so as to enable a holder of unsecured notes against him older than the mortgage notes, to acquire, by attachment, a superior lien upon the mortgaged property, provided the mortgagee promptly intervenes in the attachment proceeding and proceeds to foreclose his mortgage. (p. 839.)

MORTGAGES—Attachment—Intervention Notice.—

A mortgagee who intervenes in an action of attachment against the mortgaged property is entitled to notice of all subsequent proceedings in the action. (p. 839.)

J. F. Reed and J. P. Hartman, for the appellant.

Peters & Powell, for the respondent.

⁴⁷ CROW, J. On September 20, 1902, appellant, W. D. Perkins, commenced this action in the superior court of King county, Washington, to recover from the respondent, W. E. Bailey, the sum of three hundred dollars and interest, alleged to be due on a certain promissory note, originally made and delivered by one R. H. Goldie to said W. E. Bailey, for one thousand dollars and interest, said note being dated February 16, 1892, and by its terms falling due on May 16, 1892. It was alleged in the complaint said W. E. Bailey had, immediately after the execution and delivery of said note, by written indorsement thereon, guaranteed the payment of said note, and had waived protest and notice of protest for non-payment thereof. Action on the note was apparently barred by the statute of limitations, but in the complaint appellant alleged: "That since the first day of January, 1897, defendant has been absent from, and has continuously resided without, the state of Washington."

At the time of the commencement of this action, appellant caused a writ of attachment to be issued, on the ground of the nonresidence of W. E. Bailey, and on September 20, 1892, the sheriff of King county, under said writ, levied upon and attached all right, title, and interest of the respondent, W. E. Bailey, in and to lots 5 and 8, in block 88, Terry's second addition to the city of Seattle. ⁴⁸ Using said attachment as a basis for service by publication, appellant, by proper proceedings, commenced such service, the first publication being made on September 26, 1892. Before the service by publication was

completed, or any further proceedings were had, the intervener, respondent Edward Bailey, a brother of the respondent, W. E. Bailey, petitioned the court for leave to file a petition or complaint in intervention. His petition being granted, on November 21, 1902, he filed his petition, the same being in the nature of a cross-bill.

The intervener alleged that on March 5, 1891, W. E. Bailey had executed and delivered to the Guarantee Loan and Trust Company, at Seattle, Washington, his two certain promissory notes of that date, each for the sum of four thousand five hundred dollars, payable January 1, 1896, with eight per cent interest from date, payable semi-annually; that on said fifth day of March, 1891, for the purpose of securing the payment of these two notes, said W. E. Bailey executed and delivered to said Guarantee Loan and Trust Company one mortgage on lot 5, and one other mortgage on lot 8, in said block 88, Terry's second addition, which, it will be observed, was the same real estate attached by appellant in this action. The intervener made all the usual allegations necessary in a foreclosure action, and also alleged that W. E. Bailey had been continuously absent from the state of Washington since December, 1893. He then pleads the statute of limitations against appellant's note, and prays for the usual equitable relief in a foreclosure suit. The respondent, W. E. Bailey, by answer, entered his appearance to the petition and cross-complaint of the intervener, admitting each and every allegation thereof.

On December 10, 1902, appellant interposed a special and general demurrer to the cross-complaint, the special demurrer being based on the statute of limitations. The demurrer being overruled, appellant answered, but his ⁴⁹ answer was afterward withdrawn by stipulation, as hereinafter stated. On January 17, 1903, without any notice to the intervener, Edward Bailey, appellant caused an order of default to be entered against W. E. Bailey, who had failed to appear or plead to the complaint, and on the same day judgment was entered in favor of appellant against said W. E. Bailey, on the note described in the complaint, for six hundred ninety-seven dollars and forty cents, and costs, said sum being adjudged to be a lien on the real estate above described under appellant's attachment. On January 19, 1903, appellant caused an execution and order of sale to be issued on said judgment, and on March 7, 1903, the sheriff sold said real estate to appellant. The sale having been confirmed, and no redemption being

made, the sheriff, on March 8, 1904, executed and delivered to appellant a deed for said real estate. All of these proceedings, commencing with the default and judgment on January 17, 1903, and ending with the execution and delivery of the sheriff's deed on March 8, 1904, seem to have been perfected by appellant without notice to the intervener, and, so far as the record shows, without any actual knowledge thereof on the part of the intervener. In the meantime, the action seems to have rested without any other or further proceedings being taken by either party. On March 17, 1904, shortly after the execution of the sheriff's deed, a written stipulation between appellant and the intervener was made and filed, reading as follows: "It is stipulated and agreed between the plaintiff, by his attorneys, Reed & Rutherford, and the intervener, by his attorneys, Peters & Powell, that the plaintiff may withdraw the answer heretofore filed to the intervener's petition and substitute and file therefor another, the receipt of which is hereby accepted by intervener, and that the intervener's reply to the answer of the said plaintiff to the said petition may stand and remain as the reply to plaintiff's answer to said petition of intervener."

⁵⁰ In pursuance of this stipulation, appellant, on March 17, 1904, filed what he termed an amended answer, in which he pleaded the commencement of this action by himself, the issuance and levy of the writ of attachment, the entry of his judgment against W. E. Bailey, the execution, sale, confirmation of sale, and execution, delivery, and record of the sheriff's deed. He then proceeds to make the following allegation: "(2) That the cause of action set up in intervener's petition and cross-bill herein arose more than six years prior to the date of the levy made by said sheriff under and by virtue of said writ of attachment herein, to wit, September 20th, 1902, and no payments were ever made upon said notes referred to in intervener's petition and cross-bill; that the order granting said Edward Bailey permission to intervene in this action was made November 21, 1902; that intervener's action to foreclose said mortgages was not commenced within the time limited by law, and that more than six years have elapsed since the said notes and mortgages, referred to in paragraphs one, two, three, and four in intervener's petition and cross-bill (matured), before said Edward Bailey commenced this action in intervention herein."

Trial being had, on May 19, 1904, the court made and filed findings of fact, showing that W. E. Bailey executed the notes and mortgages in the cross-bill mentioned; that the same had been assigned to the intervener on October 23, 1891, for a valuable consideration; that no payments had been made thereon; and in the findings the following are included: “(6) That on the 20th day of September, 1902, the plaintiff, W. D. Perkins, instituted suit in this court against the defendant William E. Bailey upon a promissory note made by one R. H. Goldie to the defendant William E. Bailey in the principal sum of one thousand dollars, with interest, maturing in May, 1893; which said note plaintiff acquired by purchase from the receiver of the Merchants’ ⁵¹ National Bank of Seattle, and in aid of such suit, the plaintiff caused the interest of the said William E. Bailey in the lands under the intervener’s mortgage above mentioned to be attached by the sheriff of King county.

“(7) That on the 17th day of January, 1903, a default judgment was rendered and entered in the above suit in favor of the plaintiff W. D. Perkins, and against the defendant William E. Bailey, for the balance unpaid upon said note in the sum of six hundred ninety-seven and 40-100 dollars with interest at 12% per annum from date until paid, and decreeing the plaintiff’s attachment a lien upon the interest of said William E. Bailey in the lots hereinabove named by reason of said attachment, and thereafter the said interest of the said Bailey in said lands was levied upon by the sheriff of King county, under the aforesaid judgment, at the instance of the plaintiff, and was bought in by the plaintiff for the amount of his judgment, no money being paid therefor, and a sheriff’s deed was issued to the plaintiff for said lands on the 8th day of March, 1904.

“(8) That the intervener, Edward Bailey, filed his intervention herein, upon leave of this court first obtained, on November 21, 1902, and neither he nor his counsel thereafter had any notice whatsoever of the application by the plaintiff for default, or for judgment, or for sale of said property, or for confirmation of sale, or of any of said steps.

“(9) That the said notes and mortgages were executed and delivered by the said William E. Bailey to the Guarantee Loan & Trust Company, and by the latter sold, assigned and transferred to the intervener, Edward Bailey, for full value, and in good faith, and said Edward Bailey was not

guilty of laches or unreasonable delay in foreclosing the same, but proceeded with all possible dispatch to foreclose said mortgage upon learning of the attachment of the plaintiff W. D. Perkins."

Upon the findings, the court made and filed its conclusions of law, and entered judgment and decree, (1) in favor of the intervener for the amount due on his notes, ⁵² and ordering his mortgage foreclosed; (2) in favor of appellant for the amount due on the note described in his complaint; (3) adjudging the intervener's mortgage to be prior to the lien of appellant; (4) directing a sale of the mortgaged real estate; and (5) vacating and declaring to be null and void the judgment entered in favor of appellant on January 17, 1903, and the execution and sale had in pursuance thereof. From this judgment the plaintiff, W. D. Perkins, has appealed.

We have made quite a lengthy and comprehensive statement in order that the question raised by the appeal, and hereinafter discussed, may be the more readily understood, especially in the light of previous holdings of this court, and the peculiar facts here involved. Attention is called to the fact that had the respondent, W. E. Bailey, never absented himself from the state of Washington, the note held by appellant would have been barred at all times after May 16, 1898, or for a period of four years, four months, and four days, at the date of the commencement of this action; and that the notes held by the intervener and respondent, Edward Bailey, would have been barred at all times after January 1, 1902, or for a period of only ten months and twenty days, at the time he filed his petition and cross-bill herein.

The only question raised by appellant is the statute of limitations. He contends that, as he had obtained a lien by attachment upon the real estate above described, prior to any attempt by the intervener, respondent, Edward Bailey, to foreclose his mortgages, the appellant, as such holder of a subsequent valid attachment lien, was entitled to plead the statute of limitations against the intervener's mortgages. Appellant contends that, while the absence of the respondent, W. E. Bailey, from the state of Washington arrested the running of the statute of limitations ⁵³ as to himself, it did not arrest the running of said statute as to respondent Edward Bailey; and urges that this court has held that absence of a mortgagor from the state will not suspend the running of the statute of limitations, as against subsequent grantees, encum-

brancers, or holders of the equity of redemption; and in support of this contention he cites the following decisions of this court: *Damon v. Leque*, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485; *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756, 67 Pac. 263, 57 L. R. A. 396; *Denny v. Palmer*, 26 Wash. 469, 90 Am. St. Rep. 766, 67 Pac. 268; *Raymond v. Bales*, 26 Wash. 493, 67 Pac. 269; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271; *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 836.

We have carefully examined all of these authorities, find them perfectly harmonious, and are well satisfied with the principles therein enunciated. Most of these cases cite, and are based upon, the doctrine announced in the leading case of *Wood v. Goodfellow*, 43 Cal. 185, in which the court says: "If Goodfellow [the mortgagor] still held the equity of redemption, and if the action was against him alone, it is evident his absence from the state would afford a sufficient answer to the plea of the statute of limitations. So long as he retained the equity of redemption, and no other rights had intervened, by reason of subsequent liens or encumbrances, he had the power, by written stipulation under the statute, to extend the time within which the debt should not be barred, or he might suspend the running of the statute by his absence from the state. So long as his rights only were to be affected, it was within his power to suspend the operation of the statute, either by a written stipulation or by absenting himself from the state. But this court has repeatedly decided that as against subsequent encumbrancers, or a subsequent holder of the equity of redemption, the mortgagor has no power, by stipulation, to prolong the time of payment, or in any manner increase the burdens of the mortgaged premises."

⁵⁴ Appellant contends that, as the logical result of the rulings of this court in the Washington cases above cited, and of the language of the California court in *Wood v. Goodfellow*, 43 Cal. 185, so frequently approved and followed, it should now be held by us that, as he had obtained his lien by attachment before the intervener, respondent, Edward Bailey, attempted to foreclose his mortgages, he is entitled to plead the statute of limitations as against said mortgage liens.

Under the peculiar facts of this case, we do not think appellant is in a position to successfully make this contention. It will be observed that, in all the cases above cited, including *Wood v. Goodfellow*, 43 Cal. 185, the subsequent title, interest,

r lien held by the third party arose out of claims or demands of later date than the mortgage—or, in other words, did not arise out of claims more stale than the mortgage lien itself. In *Wood v. Goodfellow*, 43 Cal. 185, the claim on behalf of which the statute was pleaded grew out of the foreclosure of a mortgage of later date. In *Damon v. Leque*, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485, the Leques held title subsequently acquired under a judgment, execution, and sale against Iverson, the original mortgagor. In *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756, 67 Pac. 263, 57 L. R. A. 396, the respondents Butler and Friedlieb had become owners of separate portions of the mortgaged property, holding the title. In *Raymond v. Bales*, 26 Wash. 493, 67 Pac. 269, the appellant Bales had, several years after the execution of the mortgage, recorded a judgment against the mortgagor, upon which judgment execution had been issued and the mortgaged premises sold to Bales. So in *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271, the respondent Kasson had become owner of the mortgaged land by mesne conveyances, and held the title. And in *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 836, the appellant Rundle had, long after the execution of the mortgage, acquired a valid judgment lien against the real estate on which foreclosure of a mortgage was sought.

⁵⁵ It is contended, however, that appellant acquired his attachment lien after the execution of the intervener's mortgages, and prior to the commencement of the foreclosure. While this is true, the facts are that, when appellant commenced this action, he knew W. E. Bailey had been absent from the state many years, and so alleged in his complaint, for the express purpose of preventing the action on his own note being barred by the statute. This certainly shows that he had, at that time, actual knowledge and notice that the notes of the intervener, respondent Edward Bailey, were not barred. The record title to the real estate still remained in the name of the original mortgagor, W. E. Bailey, and, by reason of his absence, the notes and mortgages were not barred as against him.

In *Denny v. Palmer*, 26 Wash. 469, 90 Am. St. Rep. 766, 67 Pac. 268, this court, while recognizing the rule announced in all previous Washington cases on this question, held that the appellant Palmer could not plead the statute of limitations against a previous mortgage. It appeared that Palmer had acquired title to the mortgaged real estate by deed from

the mortgagor, which he did not record until several days after the action of foreclosure had been commenced. Speaking through Hadley, J., this court said: "Appellant's answer to the amended complaint alleges that the deed by which the mortgaged premises were conveyed by the mortgagor to appellant was executed on the twenty-third day of December, 1893, but was not filed for record until the nineteenth day of April, 1900. The original complaint in this cause was filed April 13, 1900. Appellant's deed was not filed for record until six days after this suit was actually commenced. Respondent therefore had no constructive notice of the existence of appellant's rights in the mortgaged premises until after he had actually commenced this suit. There is no averment in the answer that respondent or his assignor had, prior to that time, received any actual notice of the fact that such a conveyance ⁵⁶ had been made, and nothing appears in the record showing such actual notice. It appears, therefore, that respondent did not know that he held a cause of action against appellant prior to the time the deed was recorded. He knew he held a cause of action against the mortgagor, as to which the statute of limitations had not run because of the mortgagor's absence from the state, but he could not, under any principle of reason and justice, be chargeable with notice that appellant had any interest in the land, unless appellant's deed had been of record, or some actual knowledge of its existence had been brought home to him or his assignor. We think under such circumstances it should be held that when the deed has not been recorded within the ordinary limitation period in ample time to permit the bringing of the action within that period, or when actual knowledge of the conveyance has not been brought home to the mortgagee or his assignee in sufficient time to permit the action to be brought within such period, then the grantee should be estopped from pleading the statute against an action which is promptly begun, and within reasonable time after constructive notice of the grantee's rights has been given by filing the deed, or after the mortgagee or his assignee has received actual notice of the conveyance. This principle was sustained in *Spaulding v. Howard*, 121 Cal. 194, 53 Pac. 563."

Appellant for many years had every opportunity for proceeding upon his note, and attaching the interest of respondent in the real estate involved herein, but he delayed taking any such action. For what reason? Evidently he was wait-

ing for the arrival of the time when the intervener's note would be at least six years past due. During all of this time, he had constructive notice of the mortgage lien, and also of the fact that the record title was still in W. E. Bailey. He also had actual notice that the mortgages were not barred by the statute of limitations, because he knew of the absence of said W. E. Bailey from the state. Now, when he commenced this action, and when the intervener promptly appeared, before answer day, and ⁵⁷ sought to foreclose his mortgages, should the intervener be subjected to a successful plea of the statute of limitations by appellant, simply because appellant had obtained an attachment lien in the manner and at the time above stated? We think not. Appellant had the more stale claim of the two, and, as the court found, the intervener was not guilty of laches or unreasonable delay, but proceeded to foreclose with all possible dispatch, on learning of the attachment. The record suggests that appellant himself was not entirely satisfied to base his right to plead the statute of limitations solely upon his mere attachment lien, for, without notice to the intervener, he entered judgment, issued execution, sold the real estate, obtained a sheriff's deed, and then, by what he termed an amended answer, pleaded the title thus acquired as the basis of his further plea of the statute of limitations against the mortgages.

We think the trial court was right in vacating the judgment entered on January 17, 1903, and also in vacating the sale and sheriff's deed obtained in pursuance thereof. When the intervener had once appeared in this case, he was entitled to notice of all proceedings thereafter taken. Said judgment, execution sale, and sheriff's deed having been set aside and vacated, appellant's rights must rest entirely upon the lien obtained under his writ of attachment, which attached only the actual interest of W. E. Bailey in and to said real estate. As above suggested, at the time appellant caused his attachment to be levied, he knew of the absence of W. E. Bailey, and that the mortgage liens were not barred. His lien under his writ of attachment was therefore subject to the lien of the mortgage. Our position herein is in full harmony with the rule announced by this court in the recent case of *White v. Krutz*, 37 Wash. 34, 79 Pac. 495, wherein Fullerton, J., said: ⁵⁸ "A mortgagor, who still retained his ownership in the mortgaged property, could make a valid contract of extension of the original mortgage, which would be binding upon his subse-

quent grantee, whether the grantee takes with or without notice of such extension."

If such an extension agreement could be made by a mortgagor still holding the title, then certainly the appellant's lien under his writ of attachment affected only the actual interest of W. E. Bailey in and to the real estate, and, as above suggested, was subject to the intervener's mortgage liens. While statutes of limitation are favored as statutes of repose, we do not think, under the facts existing here, that the mortgage liens of the intervener should be cut off by appellant's plea of the statute of limitations. As has been said by respondent Edward Bailey, in his answer brief: "It would be a harsh doctrine indeed to say that appellant could rest upon his unsecured claim for nine years and oust respondent, who sues in less than seven years upon a secured claim, while as to both the statute was dormant by reason of the debtor's absence. This would make the law a pitfall rather than a relief to the mortgagee."

We think there is no error in the record, and the judgment of the superior court is affirmed.

Mount, C. J., Dunbar and Rudkin, JJ., concur.

Hadley and Fullerton, JJ., took no part.

Absence from the State as suspending the operation of the statute of limitations is discussed in the note to *Morgan v. Robinson*, 13 Am. Dec. 368-372. If one, after executing a mortgage, conveys the land subject thereto and departs from the state, so that the statute of limitations does not run in his favor, the mortgage may be foreclosed as against both him and his resident grantee in possession of the land, though, but for his absence, the statute would have afforded adequate protection to all of them: *Jenks v. Shaw*, 99 Iowa, 604, 61 Am. St. Rep. 256. See, too, *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756.

CONOVER v. NEHER-ROSS COMPANY.

[38 Wash. 172, 80 Pac. 281.]

MASTER AND SERVANT—Incompetency of Coservant—Sufficiency of Complaint.—A complaint in an action to recover for personal injury sustained through the employment of an incompetent fellow-servant, sufficiently alleges his general incompetency when it alleges that he was negligent and incompetent in the discharge of his duties, that this fact was known to the master and unknown to the injured servant, setting out the facts constituting his incompetency and negligence, and also setting out two specific instances and occasions when he had been thus negligent. (pp. 842, 843.)

MASTER AND SERVANT—Incompetency of Coservant—Evidence of Specific Acts.—In an action to recover for personal injury to a servant caused by the act of his master in retaining an incompetent fellow-servant in his employ, evidence of two prior specific acts of negligence on the part of such fellow-servant is admissible, in connection with further testimony that the master was informed of such specific acts. Such prior acts constitute a series of acts showing general incompetency. (p. 843.)

EVIDENCE—Time-books.—If one person claims to have been in the employ of another at a certain time, the time-book of the latter is not admissible in evidence to show such claim to be untrue. The knowledge of the owner of the time-book is the primary and best evidence when he is able to testify to the fact. (p. 844.)

EVIDENCE—Antecedent Declarations.—If Testimony is Assailed as a fabrication of recent date, the imputation may be repelled by proof of the antecedent declarations of the witness. (p. 845.)

NEW TRIAL—Misconduct of Jury.—The fact that the jury took a ballot on a quotient verdict is not ground for a new trial, when there is no agreement to be bound by the result of such ballot, and other ballots were subsequently taken, and the result of such ballot was not in fact adopted. (pp. 845, 846.)

Kerr, McCord & Craven and Brown & Rose, for the appellant.

Pemberton & Sather, for the respondent.

174 HADLEY, J. This is an action to recover damages for injuries received in the defendant's shingle-mill. The plaintiff was caught by a saw, and his left arm was cut off a few inches above the wrist. The negligence charged to the defendant was the use of defective machinery, and the employment of an incompetent engineer. The first ground was eliminated at the trial, and the case rested upon the charge of employing an incompetent engineer. The defendant pleaded contributory negligence, assumption of the risk, and negligence of a fellow-servant. The cause was

tried before a jury and a verdict was returned for plaintiff in the sum of fifteen hundred dollars. The defendant has appealed.

A number of assigned errors involve the single question of the sufficiency of the complaint. These include rulings upon the demurrer to the complaint, upon objection to the introduction of any testimony, upon the motion for nonsuit, and upon certain instructions. It is urged that the complaint does not make any general charge of incompetency against the engineer, but is confined to allegations as to two specific acts of negligence. The complaint contains the averment that appellant was negligent in the employment of a proper person to attend to the duties of engineer, in that it employed an old man, "who was careless and negligent and incompetent in the discharge of his duties as engineer, by not giving the warning signals when starting the engine; that plaintiff had no knowledge of the negligence and carelessness and incompetence of the engineer, but which was known to defendant, yet defendant retained him in its employment as such engineer; that the times when the engineer negligently and carelessly started the engine, prior to the injuries hereinafter complained of, without giving the proper signals, as above alleged, are as follows: On or ¹⁷⁵ about the twenty-first day of January, and in the latter part of February, 1903."

While the language employed in the pleading is not as comprehensive as it might have been, yet we think the first part of the averment amounts to a general charge of incompetency, and that what follows is in the nature of a specification of some facts in support thereof. It is also alleged that there were certain established oral rules governing the giving of signals for starting and stopping the machinery of the mill; that, under the rules, the engineer was required to ring two bells as warning signals that the machinery was about to be started; that at the time of the accident, the respondent was in the act of oiling the machinery, when, without ringing the warning bell, the engineer caused the engine to start, and respondent's clothing was caught by the moving machinery, and he was thereby thrown against the moving saw, which caused his injury. We think, as against demurrer, the complaint sufficiently charges negligence against appellant by way of knowingly

continuing in its employ an incompetent engineer. The demurrer was, therefore, properly overruled. For the same reasons it was not error to admit testimony in support of the complaint. It was also proper to deny the motion for nonsuit, and to give the instructions criticised, when those questions are considered with reference to the sufficiency of the complaint alone.

It is urged that it was error to admit evidence of prior specific acts of negligence on the part of the engineer. Such proof certainly bore upon the question of general incompetence, and was proper for that purpose. In *Holland v. Southern Pac. R. Co.*, 100 Cal. 240, 34 Pac. 666, cited by appellant, the court observed that "the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to ¹⁷⁶ perform a particular service." It is true the court further said, in substance, that a single act of casual neglect does not per se tend to prove that one is unfitted for a position requiring care and prudence, and that character is exhibited not by a single act but by a series of acts. Evidence as to the single act was held insufficient in the case. Adopting the reasoning of the court, however, it follows that evidence as to a series of acts cannot be had except by reference to the specific ones which together constitute the series. In the case at bar, an effort was made to show two prior acts of the engineer of the kind alleged in the complaint, and we think it should not be said, as a matter of law, that two such acts do not constitute a series bearing directly upon the question of general incompetency. The evidence was competent in connection with further testimony that appellant was informed of these specific acts. That evidence of such specific acts is competent was held by this court in *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310. Respondent cites many other cases upon this point, but we shall not cite them here, inasmuch as the question has already been decided by this court. Appellant seeks to distinguish *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310, from the case at bar, under the claim that general incompetency was alleged in the former case, and was not alleged in the one now before us. We have already said, however, that we think general incompetency is alleged here.

It is next assigned that the court erred in sustaining the objection to the introduction of appellant's time-book in evidence. A witness for respondent had testified that he was working for appellant in the latter part of February, 1903, and that, while so employed, the engineer, upon one occasion, failed to give the signal before starting the engine. The appellant attempted to show by its time-book¹⁷⁷ that the witness was not in its employ at the time of which he testified. But the court excluded the book. Appellant urges this claim of error, upon the general ground that books of account are admissible in evidence in one's own favor. The rule is, however, not without limitations. The trial court excluded the book on the theory that it was not shown to be the best evidence. Appellant's officers, who, it was shown, had charge of the employment of the men, had testified, and they were not asked as to whether the witness was in their employ at the time mentioned. It was the court's view that their knowledge upon the subject was the primary evidence, and it had not appeared that they were unable to testify as to the fact.

"As has already been stated, the principal ground upon which books of account are admitted in evidence is the necessity of the case, inasmuch as such books are frequently the only obtainable evidence of the subject matter in controversy. But when better evidence can be furnished, this necessity does not exist, and hence a book of accounts is not admissible as evidence of items entered therein when it appears from the testimony of the parties or the nature of the transaction that more satisfactory evidence exists": 9 Am. & Eng. Ency. of Law, 2d ed., 929.

The above statement of the law sustains the trial court's view. A time-book offered for a similar purpose was excluded in *Morse v. Potter*, 4 Gray, 292. The court observed in that case that: "A time-book, kept in a tabular form, and in which charges for labor are intelligibly indicated, has been held admissible in evidence, with the party's supplementary oath: *Mathes v. Robinson*, 8 Met. 269, 41 Am. Dec. 505. But the book that was offered in evidence in the present case was not a book of that kind. It was a book of credits, and not of charges, and was offered for the purpose of proving, by the defendant's omission to give credit for certain days' work, that the plaintiff did not work on those

days. It was clearly inadmissible." ¹⁷⁸ Within the authorities cited, the court did not err in rejecting the time-book.

It is argued that the court permitted evidence as to self-serving declarations of respondent. Appellant had introduced evidence to the effect that respondent said, soon after the accident, that it occurred through his own fault and carelessness. In rebuttal, respondent produced two witnesses who were permitted, over objection, to testify as to statements made by respondent. The undoubted theory which appellant sought to impress upon the jury was that respondent's testimony at the trial was a recent fabrication. The testimony it had offered would naturally lead to that belief in the minds of the jury. The two witnesses, whose testimony is now criticised, testified in rebuttal as to statements made by respondent at the surgeon's office, soon after the accident. Whether the statements made under the influence of suffering, so soon after the injury, were a part of the *res gestae* is not discussed by respondent, but, if they were not, we believe the testimony came within the rule discussed in *State v. Manville*, 8 Wash. 523, 36 Pac. 470, which is to the effect that, when testimony is assailed as a fabrication of recent date, the imputation may be repelled by proof of the antecedent declarations of the party. The testimony was properly admitted.

Errors are assigned upon the instructions given, and upon the refusal to give requested ones. We believe, however, that the law governing the case was fairly stated to the jury, and we find no error in that regard.

Misconduct of the jury is urged upon the motion for new trial. It is claimed that the verdict was reached by the quotient process. It appears that, after it had been determined to return a verdict for respondent, it was proposed that each juror should write upon a piece of paper ¹⁷⁹ the amount which he favored for the verdict, and that the aggregate should be divided by the number of votes cast. This was done, and the result was thirteen hundred and seventy dollars. It does not appear that there was any agreement in advance to be bound by the result, or by this plan of arriving at the sense of the jury as to the amount. Moreover, the result was not adopted and, after three additional ballots, the sum of fifteen hundred dollars was

found and returned. The case is within the rule of *Bell v. Butler*, 34 Wash. 131, 75 Pac. 130, and cases there cited.

It was not error to deny the motion for new trial. The judgment is affirmed.

Mount, C. J., Fullerton and Dunbar, JJ., concur.

Rudkin, Root and Crow, JJ., took no part.

The Case of *Anderson v. Hilker*, 38 Wash. 632, 80 Pac. 848, was an action to recover for an alleged breach of a contract to move certain buildings within a reasonable time. The contractor claimed that the delay was caused by continued bad weather at a certain time which caused inability to obtain necessary moving material. The court below held that upon the issue as to the condition of the weather at the particular time, the records of the office of the United States Weather Bureau were admissible in evidence, and this ruling was affirmed by the supreme court on appeal.

A Book Kept by a Person employed in the signal service, whose duty it is to record the facts therein stated, is admissible in evidence to prove such facts: *Scott v. Astoria R. R. Co.*, 43 Or. 26, 99 Am. St. Rep. 710. See, too, *Mears v. New York etc. R. R. Co.*, 75 Conn. 171, 96 Am. St. Rep. 192. So, the trip report of a street-car conductor, showing the number of passengers on a certain trip and that they paid cash fares, is admissible in evidence against one who claims to have been a passenger under a transfer slip on that trip and negligently injured: *Callihan v. Washington Water Power Co.*, 27 Wash. 154, 91 Am. St. Rep. 829. And a train dispatcher's sheet on which he marks the time of the arrival and departure of trains as telegraphed him by operators at the railway stations, is admissible to show the facts therein recorded: *Firemen's Ins. Co. v. Seaboard Air Line Ry.*, 138 N. C. 42, ante, p. 517.

Quotient Verdicts are discussed in *Gordon v. Trevarthan*, 13 Mont. 387, 40 Am. St. Rep. 452; *Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232; *Watson v. Reed*, 15 Wash. 440, 55 Am. St. Rep. 899; *Sanders v. State*, 45 Tex. Cr. Rep. 518.

HARRIS v. COWLES.

[38 Wash. 331, 80 Pac. 537.]

NEGLIGENCE—Injury to Child by Revolving Door to Building.—The owner of a building containing an unguarded "circular entrance," consisting of a revolving door, is not liable for an injury to a trespassing child of tender years by such door while at play. Liability cannot be based on the ground that such device is particularly attractive to children and that it is negligence to leave it unguarded. The doctrine of the "turntable cases" does not apply. (p. 849.)

NEGLIGENCE.—Doctrine of Turntable Cases will not be extended to cases not involving turntables themselves. (p. 850.)

PLEADINGS—Amended Complaints.—The trial court may properly refuse to allow a third amended complaint to be filed, after having considered an original and two amended complaints in the same action and involving the same matter. (p. 850.)

Robertson, Miller & Rosenhaupt, for the appellant.

H. M. Stephens, for the respondent.

⁸³³ **HADLEY, J.** This is an action to recover damages for injuries received by a child from a revolving door. The second amended complaint alleges that the defendant is the owner of the structure known as the "Review Building," in the city of Spokane, and that on the eleventh day of October, 1903, there was maintained as a part of said structure a devise known as a "circular entrance," which was composed of a circular shell, about five feet in diameter and seven feet high, with an opening on each side thereof for persons to enter the building; that on the inside of said circular shell was a revolving door which divided the interior space into four apartments, each apartment being separated from others by wings constructed of heavy wooden material, which wings were securely fastened together and revolved upon pivots, one in the floor below and one at the top; that the circular entrance was so arranged that persons desiring to enter the building passed through the first opening of the shell into one of the apartments, and pressed against the wing in front, which would revolve to the opposite opening or exit from the shell; that each apartment was large enough to accommodate one person in entering or leaving the building; that the wings were so constructed that the outer edges thereof came close up to the shell, and left only sufficient space

to avoid friction; that the defendant negligently constructed and maintained said entrance in this, that the apartments were too small, and the wings in revolving came close up to the sharp edges of the jambs of the opening; that in revolving there was nothing to prevent the limbs or body of a ³³⁴ person from being caught between the jambs and partition immediately behind the person thus imperiled; that, by virtue of the manner in which the device was constructed and operated, revolving as it did upon pivots, it was particularly enticing to children of tender years, and of the age of the plaintiff; that the Review Hotel is conducted in the building, and a great many rooms therein are rented to families; that children are frequently in the hallways for purposes of play, at all hours of the day and evening; that the defendant knew that children resorted to said entrance for the purposes of play; that the place was peculiarly dangerous as a resort for children of tender years, and that it was left unguarded and unprotected. It is further alleged that, while passing through the entrance, the plaintiff's right wrist was caught between the outer edge of one of the wings and the jamb, causing her to be severely injured. The defendant demurred to the complaint upon the ground that it does not state sufficient facts to constitute a cause of action. The demurrer was sustained. Application was then made by plaintiff for leave to file a third amended complaint, which was denied, and thereupon, on motion of the defendant, judgment was entered dismissing the action. The plaintiff has appealed.

It is assigned that the court erred in sustaining the demurrer to the complaint. The complaint states that the appellant is a child of tender years, but her age is not stated. There is no allegation which shows that the respondent was, at the time, under any relation of duty to the appellant, other than that which he owed to an ordinary trespasser, or at most to a mere licensee. There is no allegation showing that the door was not so constructed as to safely answer the purposes for which it was intended, when used for that purpose only, viz., for passage to and from the building. If the complaint states a cause of action, ³³⁵ it must be upon the theory that the device was peculiarly attractive to children, and that the doctrine of the "turntable cases" should be invoked in appellant's

behalf. To that subject the principal arguments in the briefs are directed. It would be difficult to apply the turntable rule to a device of this kind, intended as it was for constant use in passing to and from the building. It could not be used for the purpose intended if it should be locked. The rule of the turntable cases requires that the device shall be kept locked or guarded when not in use, and it is well known that the ordinary turntable is only used occasionally. The purpose of this circular door, however, requires that it shall be subject to the uses of ordinary passage at any moment, and it is manifestly impracticable to keep it locked or guarded, if it serves the purposes intended.

In *Clark v. Northern Pac. R. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508, this court recognized that it had already applied the doctrine of the turntable cases to a turntable itself. It was stated in that case that those cases "are based upon the theory that a turntable is a machine of such a nature as to attract children to play with it, and being inherently dangerous for children to handle, negligence is predicated upon the failure to lock it or securely fasten it so that it cannot be moved by children." While it was also said in that case that the railway company had not placed upon its premises a dangerous machine or device that was, in its nature and at once, particularly attractive to children, yet because the application of the doctrine was invoked we said: "But in view of the more modern tendency of the courts, we should, however, hesitate to extend the rule as one of general application to other conditions"; and cited authority to the effect that the modern tendency is, at least, against the extension of the doctrine. Again, in the recent case of *Curtis v. Tenino*³³⁶ *Stone Quarries*, 37 Wash. 355, 79 Pac. 955, decided by this court, the same doctrine was invoked as applying to the machinery used about a stone quarry. The opinion quotes with approval from that of the *Clark* case, and adds: "To hold, as a general and universal rule of law, that the owners of mills and factories must so construct and maintain their premises as to be reasonably safe for trespassers, infants or adults, regardless of how they may gain admission, would be destructive of all industry and all property rights."

We therefore think it has already been made clear by former decisions that this court will not extend the application of the doctrine of the turntable cases beyond a turntable itself. Whatever may be said of the wisdom of that rule, as applied to the one condition, established as it was by judicial decisions, but severely criticised by others refusing to follow it, still, when we contemplate its extension to the manifold other relations and conditions which arise in the affairs of life, we must see that it would be productive of litigation to such an extent as would greatly endanger the security of property interests. It is aptly suggested by respondent, in his brief, that swings, teeterboards, lumber piles, fences, gates, walls, buildings, trees, hanging on vehicles, and numerous other similar things are attractive to children. It will, therefore, be seen that, if this doctrine should be made one of general application for the protection of children against everything that may be especially attractive to them, it would result in requiring all property holders to assume toward children who may be attracted to their premises a degree of duty and care which properly belongs to parents or guardians. Respondent cites authorities which strongly support us in these views, but inasmuch as we have before discussed this subject, 337 we shall not take the space to review them here. We think the court did not err in sustaining the demurrer.

It is further urged that it was error to refuse appellant permission to file a third amended complaint. We think the court did not abuse its discretion in that regard. Three complaints, the original and two amended ones, had been filed, and it was within the limits of reasonable discretion that the court should refuse to consider a fourth one.

The judgment is affirmed.

Mount, C. J., Fullerton and Dunbar, JJ., concur.

Rudkin, Root and Crow, JJ., took no part.

There is No Duty Imposed on the Owner of Premises, it seems, to keep them in a safe or suitable condition for those who come there for their own convenience or pleasure merely, without invitation from the owner: See Utterholm v. Bogg's Run Co., 50 W. Va. 457, 88 Am. St. Rep. 884; Ryan v. Towar, 128 Mich. 463, 92 Am. St. Rep. 481; McCaughna v. Owasso etc. Co., 129 Mich. 441, 95 Am. St. Rep. 441; Illinois Cent. R. R. Co. v. Arnola, 78 Miss. 787, 84 Am. St. Rep. 645. In a recent New Jersey case it is held that if the owner of property

abutting on a street, or his agent standing in his rights, deposits therein building materials attractive to children as a place to play or rest, he owes no duty to so arrange them as to be safe for a child using them as a playground or resting place: *Friedman v. Snare*, 71 N. J. L. 605, 108 Am. St. Rep. 000.

FLOOD v. LIBBY.

[38 Wash. 366, 80 Pac. 533.]

EXECUTIONS—Supplementary Proceedings—Judicial Notice of Record.—A proceeding supplementary to execution is merely auxiliary to the original action, and the court will take judicial notice of the entire record. (p. 853.)

EXECUTION—Supplementary Proceedings—Sufficiency of Affidavit.—If the record shows the entry of judgment, issue of execution, and its return unsatisfied, and fifteen days subsequently thereto an affidavit in a proceeding supplementary to execution is filed, stating that the judgment debtors have property which they refuse to apply to the satisfaction of the judgment, that they are in receipt of large salaries, own life insurance policies, having large cash withdrawal values, and have real estate interests of unknown value and nature, and that plaintiff believes that they will secrete and dispose of their property, such affidavit is sufficient to give the court jurisdiction to require defendants to appear and answer concerning their property and to restrain them from disposing of it. (p. 854.)

MUNICIPAL CORPORATIONS—Garnishment.—Neither warrants issued for salaries of school teachers, nor the salary of such teachers, can be seized under execution in supplementary proceedings. Such seizure would in effect amount to a garnishment of a municipal corporation. (p. 854.)

APPEAL—Record.—Affidavits filed after appeal taken and not made part of the record by statement of fact, cannot be considered as evidence on the appeal. (p. 855.)

EXEMPTIONS—Endowment Insurance Policies.—A statute exempting the proceeds of all life and accident insurance policies from all liability for any debt applies to an endowment or investment policy, payable to the insured or his estate, and having a present cash surrender value. (p. 855.)

EXEMPTIONS—Insurance Policies—Conflict of Decisions.—A decision by a national court that the national bankruptcy act subjects all life insurance policies to the payment of debts does not affect the status of such a policy as being exempt under a state statute, when an attempt is made to enforce a debt under the state law. (pp. 856, 857.)

EXECUTIONS—Supplemental Proceedings—Receivers.—The appointment of a receiver in proceedings supplemental to execution will not be disturbed on appeal, when the court finds generally that the judgment debtor is unjustly withholding property, although an order for the delivery of certain exempt property to the receiver is erroneous, and must be reversed. (p. 857.)

E. Miller, for the appellants.

M. F. Mendenhall, for the respondent.

³⁶⁸ HADLEY, J. This appeal arises out of a proceeding supplementary to execution. A motion was filed in the original cause, calling for the issuance of a citation requiring the judgment defendants to appear and answer under oath concerning their property that may be applied to the payment of the judgment, and also asking for an order restraining them from secreting, or in any manner disposing of, their property. The motion was supported by affidavit, which recited that a judgment for eighteen hundred and twenty-two dollars and twenty-five cents was duly docketed in the cause, upon which execution was issued, and that it had been returned unsatisfied. The affidavit further states that the judgment debtors have property which they unjustly refuse to apply toward the satisfaction ³⁶⁹ of the judgment; that both of the defendants are drawing large salaries as teachers in the high school of the city of Spokane, all of which salaries are not exempt from execution; that the defendants own and hold life insurance policies which have large cash withdrawal values, and that they have interests in real estate, the exact nature of which is unknown to the plaintiff; that the defendants refuse to apply any of their property, credits, or cash toward the satisfaction of the judgment, and that plaintiff believes they will secrete and dispose of their property, if they should be advised of this application.

Upon the filing of the motion and affidavit, the court issued a citation, and restrained the defendants from in any manner disposing of their interests, whether in joint, separate, or community property, until the further order of the court. The defendants moved to set aside the citation and restraining order, upon the alleged ground that the affidavit did not disclose sufficient facts to authorize their issuance. The motion was denied, testimony was thereafter heard, and the court entered an order in which it was found that the defendants have property which they unjustly withhold from the payment of plaintiff's judgment, and that a receiver should be appointed to take possession of such of defendants' property as is not exempt from execution. A receiver was appointed, and he was directed to take possession of defendants' property, sell such thereof as is not by law exempt from sale and execution, and apply the proceeds to the satisfaction of the

judgment. The order also directed the defendants to deliver to the receiver "all life insurance policies, books of account, title deeds, savings banks deposit books, or other vouchers or instruments representing or evidencing money or credits due to said defendants, or either of them, owned or in the possession or control of the said defendants, or either of ⁸⁷⁰ them." The order also restrained the defendants from in any manner disposing of their property. The defendants have appealed from the order.

It is assigned that the court erred in issuing the citation and restraining order, and in denying appellants' motion to set them aside. This claim of error is based upon the ground that the affidavit was insufficient to give the court jurisdiction to act in the premises. It is contended that this is an independent proceeding, distinct from the original action, and that all facts necessary to give the court jurisdiction should appear upon the face of the affidavit. The affidavit does not disclose the date of the judgment, and it is contended that it may have been entered at any time from six to seven years prior to the filing of the affidavit. The affidavit does not show the date of the issuance of the execution, or of its return unsatisfied, and it is urged that, so far as appears in the affidavit, the judgment may have been paid years before the making of the affidavit. It states, however, that the judgment "is duly docketed in said cause and court," and it is made sufficiently clear that the judgment is unpaid. This is not an independent proceeding, but is merely auxiliary to the original action, and a continuation thereof: *Murne v. Schwabacher*, 2 Wash. Ter. 130, 3 Pac. 899; *Field v. Greiner*, 11 Wash. 8, 39 Pac. 259. The court, therefore, took judicial knowledge of the entire record. A supplemental transcript filed here shows that the judgment was entered November 23, 1903; that execution was issued the same day, and was returned two days later, with the certificate of the sheriff that the appellants refused to satisfy the judgment, and that he had made diligent search but failed to find any property with which to satisfy the execution. Fifteen days later the affidavit was filed. There were sufficient facts disclosed by the ⁸⁷¹ affidavit and record to give the court jurisdiction to issue the citation and restraining order.

The appellants are husband and wife, and are both employed as teachers in the high school of Spokane. A subject much discussed by respondent is that the salaries of both can-

not be exempt from seizure under the terms of Ballinger's Code, section 5336, which exempts "the earnings of the judgment debtor for his personal services rendered within sixty days next before the institution of the special proceeding." We do not understand that the trial court held any portion of the salaries to be subject to seizure. The order entered by the court says nothing expressly upon that subject. At the time the testimony was taken the court expressed the view that the salaries cannot be seized, for the reason that they accrue to appellants as the obligations of a municipal corporation, and that their seizure would in effect amount to a garnishment of the municipality. We therefore apprehend that the court did not intend the order subsequently entered to reach the salaries.

It is possible, however, that the following words in the court's order, "or other vouchers or instruments representing or evidencing money or credits due to said defendants, or either of them," may support the contention that they are broad enough to include school warrants. While, as we have said, we do not believe the court so intended the language, yet, in view of the respondent's argument, it is proper that we should now say that if such was the intention, we think school warrants and salaries should be excepted from the operation of the order, for the reason that their seizure would in effect involve a garnishment of a municipal corporation. It was held in *State v. Tyler*, 14 Wash. 495, 53 Am. St. Rep. 878, 45 Pac. 31, 37 L. R. A. 207, that this cannot be done, in the absence of a statute authorizing it. That decision was ³⁷² founded upon reasons of public policy there discussed, and upon authorities therein cited. Respondent argues that this is not a garnishment proceeding, but it seeks to accomplish the same result, and the argument as applied to garnishment proceedings applies with equal force here.

The principal contention of appellants is that, under the statute of 1895, their life insurance policies cannot be seized. That statute is found in Ballinger's Code, section 5252. It was held in the case of *In re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602, that the statute is not retroactive in its effect, and does not interfere with the application of the proceeds of life insurance to indebtedness existing before the statute. The respondent contends that the indebtedness sought to be enforced here existed prior to the statute of 1895, but appellants urge that there is no proof that such is

the fact. The note upon which the judgment was founded bore date September 10, 1896, which was more than a year after the statute was in force. Some effort was made to show, by the oral examination of the appellants, that the note was given as a renewal for several loans previously made by respondent to appellants, but that testimony does not satisfactorily show when the indebtedness was first created. An affidavit of respondent, filed in the superior court long after this appeal was taken, and brought here as a part of the supplemental transcript, states that the note described in the complaint was a renewal note, including five separate loans made by her to appellants during the years 1891, 1892, and 1893. Appellants moved to strike this affidavit, for the reason that it is not included in the statement, or any statement of facts certified by the court. The motion must be granted, and, with the affidavit stricken, there is no definite, tangible evidence before us that the indebtedness existed prior to the statute of 1895. So far as the record now ³⁷³ discloses, therefore, the appellants' policies of insurance are subject to the operation of that statute.

It is insisted by respondent that, even under the statute of 1895, investment or endowment insurance which has a present surrender cash value to the holder is not exempt from liability for debts. It is argued that the proceeds of a policy payable to the insured or to his estate, and which has a present cash value, becomes the property of the insured as much as any other class of property, and may be reached for his debts, and we are asked to construe the statute of 1895 as including only such insurance as is payable to a beneficiary other than the insured, and which is manifestly intended for the protection of the family or other beneficiaries, without any present or prospective interest in the insured himself.

It would be difficult to employ language more sweeping and comprehensive than that used in the statute. It reads as follows: "The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt." It will be observed that all life and accident insurance shall be exempt from all liability for any debt. It is within the power of the legislature to declare what property shall be exempt, and we think the language of the statute is too plain to call for controversy. The classes of insurance which respondent insists are not included in this statute are properly known as life insurance. Whatever the terms of payment, yet the con-

ditions of the policies relate, among other things, to the tenure of life of the insured. The argument of the respondent would apply to the proceeds of accident insurance, since, in the case of an injury not resulting in death, the indemnity is paid to the insured, and becomes his property; but it must be conceded that accident insurance is made exempt by the statute. This statute was considered by the United States ³⁷⁴ district court for the district of Washington. The two insurance policies before that court were for five thousand dollars and two thousand dollars, respectively. Daniel L. Holden was the insured in both, and Lizzie Holden was the beneficiary in both, with the provision, however, that if she should not survive him, the payment should be made to his executors, administrators and assigns. The insured and beneficiary were adjudged bankrupts, and they claimed the two life insurance policies as exempt. The court held that they were exempt, but on appeal the circuit court of appeals held that they were not exempt: See *In re Holden*, 113 Fed. 141, 57 C. C. A. 97.

Respondent cites the last-named decision as authority for her contention here. Prior to that decision, this court had not construed the state statute upon the question involved here. It is doubtful, however, even if such construction had been theretofore made, if it would have led to a different result in the federal court, for the reason that that court considered the matter with reference to the national bankruptcy law, and in a bankruptcy proceeding. Section 6 of the bankruptcy law of 1898 is as follows: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

Notwithstanding the above, the federal court held that the provision does not pervade the whole bankruptcy act, but is controlled by section 70a thereof, and that, under the latter section, policies of insurance payable to the bankrupt himself, his estate, or personal representatives, pass to the trustee of the estate. It will thus be seen that the decision was based upon an interpretation of the bankruptcy ³⁷⁵ law to the effect that such policies of insurance are expressly declared not exempt, and that such provision obtained in the bankruptcy proceedings, regardless of the Washington statute upon the subject. As we understand the decision, it does not undertake

to determine that our statute does not exempt such insurance policies, but that notwithstanding such exemption by the state law, they are not exempt in a bankruptcy proceeding. Such holding in no manner interferes with the application of the statute when an attempt is made to enforce a debt under state laws. It is therefore held here that the statute exempts all life and accident insurance, except for debts existing prior to the taking effect of the act.

It follows from the foregoing that that portion of the court's order which directed appellants to deliver to the receiver all life insurance policies, and restraining them from assigning or disposing of the same, was erroneous, in the absence of proof that the indebtedness was created prior to the act of 1895. As the record and proofs now stand, the order must be modified to the extent of omitting the portion mentioned. We shall not disturb the appointment of the receiver, in view of the court's general finding that property is unjustly withheld, and of the direction that other classes of property shall be delivered to the receiver. The receivership is authorized under Ballinger's Code, section 5319. The cause is remanded with instructions to proceed in accordance herewith. The appellants shall recover costs of the appeal.

Mount, C. J., Fullerton and Dunbar, JJ., concur.

Rudkin, Root and Crow, JJ., took no part.

The Salary of a Public School Teacher, while in the hands of the disbursing agents of the school district, is generally regarded exempt from the demands of his creditors and not subject to attachment or other legal process: See the monographic note to *Dickinson v. Johnson*, 96 Am. St. Rep. 452.

The Exemption from Execution of Life Insurance moneys is discussed in *Estate of Brown*, 123 Cal. 399, 69 Am. St. Rep. 74; *Hise v. Hartford etc. Ins. Co.*, 90 Ky. 101, 29 Am. St. Rep. 358.

The Appointment of Receivers in supplementary proceedings is discussed in the monographic note to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 94, and the subsequent case of *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178, 73 Am. St. Rep. 678.

CLARK v. ELTINGE.

[38 Wash. 376, 80 Pac. 556.]

MORTGAGES—Foreclosure—Redemption—Possession—Conflict of Statutes.—If, at the time of the execution of a mortgage and at the time of its foreclosure, the statute permits the purchaser to take possession immediately upon confirmation of the sale, and retain it during the period of redemption, an intermediate statute in force during the existence of the mortgage permitting the mortgage debtor to have possession during such period of redemption has no application, so as to entitle such debtor to a credit for rental value of the premises during the period of redemption. (pp. 859, 860.)

CONFLICT OF LAWS—Husband and Wife—Wife's Liability. Whether a wife is personally liable on a note executed by her husband while a resident of another state depends upon the law of that state at the time when the debt was contracted, and such law is presumed to be the same as the law of the state where the action is brought. (p. 860.)

STATUTES of Another State—Construction of Opinion of Lawyer.—A lawyer or person learned in the law of another state is incompetent to give his opinion as to the "consensus of opinion of the bench and bar" of such state as to the meaning of one of its statutes when the text of such statute is before the court. (p. 861.)

STATUTES of Another State—Construction of.—In the absence of the construction of the statute of one state by the courts of that state, it is the duty of the courts of another state to construe such statute according to the rules applicable to the construction of the statutes of their own state. (p. 861.)

JUDGMENTS of Courts of Other States—Conclusiveness.—A decree of mortgage foreclosure, fair and regular on its face, rendered by a court of general jurisdiction in one state upon summons by publication, is conclusive in another state as to the fact of foreclosure, when the trial court decides that the record showing such foreclosure is properly authenticated to be received as evidence. (p. 862.)

CONFLICT OF LAWS—Exemptions.—If by the laws of one state the wife is liable for the debt of her husband while a resident of that state, the only exemption to which she is entitled upon changing her residence to another state is that provided by the law of the latter state. (p. 863.)

CONFLICT OF LAWS—Place of Liability.—The liability of a person upon a note or other obligation is fixed and determined by the law of the place where the obligation is created, but all matters appertaining to the enforcement of the remedy are controlled by the law of the forum. (pp. 863, 864.)

B. C. Mosby, for the appellants.

W. T. Stoll and B. B. Adams, for the respondent.

377 ROOT, J. In 1885, while respondents were residing as husband and wife, in the state of Montana, the husband borrowed from assignors of appellants the sum of four thou-

sand two hundred and seventy dollars, giving his promissory note therefor, secured by mortgage upon the property which he bought with the money, and used as a home for himself and wife. Subsequently they changed their residence to this state, and turned over the possession of the mortgaged property to appellants, who collected the rents, paid therefrom taxes and incidental expenses, and applied the balance as payment upon the note. In 1899 appellants foreclosed the mortgage, and applied the proceeds of the sale of the property upon the note. No deficiency judgment was taken, no personal service having been had upon respondents. Appellants brought the present action to recover the balance due upon said note. This case has been appealed here by these same appellants twice heretofore: 29 Wash. 215, 69 Pac. 736; 34 Wash. 323, 75 Pac. 866.

Some of the questions involved in the present appeal appear to have been decided in the former decisions, and we have no disposition to change the conclusions therein announced. In the trial from which the present appeal ³⁷⁸ was taken, there was a question as to how much of the rental of the premises should be credited upon the note. Appellants claimed that the property was turned over to them, and that they were to get such an amount of rentals as they could, and after deducting the taxes and costs of necessary repairs and incidental expenses, apply the balance as credits upon the note. Respondents claimed that they were to be allowed a straight credit of thirty-five dollars a month for the use of said premises. This issue was one of fact for the jury to determine upon the evidence. It is also contended by the appellants that the allowance of credit for rentals should be only for that period prior to the foreclosure of the mortgage. Respondents, however, claim, and the trial court held and instructed the jury, that they were entitled, also, to an allowance of credit of the rentals for the period of the one year of redemption following the date of the foreclosure. Said court based its ruling on the statute of 1897, page 227, laws of this state. We think the appellants' contention must be sustained. At the time this mortgage was foreclosed, the law of this state permitted the purchaser to enter into possession of the property immediately upon the confirmation of the sale upon foreclosure: Laws 1899, p. 92. At the time of the execution of the mortgage, the law was practically the same: 2 Hill's Code, sec. 519; *Debenture Corp. v. Warren*, 9 Wash. 312, 37 Pac.

451; *Hardy v. Herriott*, 11 Wash. 460, 39 Pac. 958; *Knipe v. Austin*, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531; *Hagerman v. Heltzel*, 21 Wash. 444, 58 Pac. 580. During the period of two years, from 1897 to 1899, there was in existence a statute allowing the judgment debtor to have possession of property during the year of redemption (Laws 1897, p. 227); but we cannot see why that statute should apply here. The charge of the trial judge to the jury wherein he authorized⁸⁷⁹ them to credit said year's rental upon the note was, therefore, erroneous.

The question of the wife's liability is again presented upon this appeal. As to whether or not she was liable in any way for this debt must depend upon the law of Montana, as it existed at the time the indebtedness was created. In the absence of a showing as to what the law of Montana was regarding this matter, it must be presumed to have been the same as the law of this state: *Clarke v. Eltinge*, 29 Wash. 215, 69 Pac. 736; *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791. It was held by this court, when this case was here before, that, under the laws of the state, this debt would be a community debt. As to this question of her separate property being liable for this obligation, under the statutes of that state, this court, in 34 Wash. 323, 75 Pac. 866, said: "Whether that fact brings this debt within the classification of the husband's liabilities for which the wife's separate property is not exempt, we apprehend must depend upon the construction placed upon the statute by the courts of Montana, and resort must be had to such construction, as a fact, to determine the force of the statute when applied to the facts here."

In view of this holding, respondents, in the last trial, placed upon the witness-stand an attorney of many years' experience in the practice in the state of Montana, and sought to show by him "the consensus of opinion of the bench and bar of Montana as to the meaning of that section"—referring to a section of the Montana statutes relating to exemptions of a wife's property. We do not believe this is a proper method of ascertaining the construction to be placed upon the statutes of a sister state. Doubtless, the general rule is that a person, learned in the law of a foreign state or country, may give evidence as to what the law of that state or country is. When the law in question⁸⁸⁰ is a statute of a sister state, and the text of that statute is before the court (as it

was in this case), the question of the construction to be given to the language thereof should be determined by ascertaining, if possible, the construction given said statute by the highest court of that state. If this cannot be ascertained, it would be doubtless competent to show what the holdings of courts of general jurisdiction in that state were as to this law. If no proof as to the holding of any court of that state is produced, then it is the duty of the court where the trial is being had to interpret and construe the statute of said sister state according to the same rules that are applicable in the construction of a domestic statute. This we conceive to be the proper method, instead of attempting to prove by some lawyer his view of said statute, or his opinion as to what the consensus of the opinion of the bench and bar of said other state might be. In the case at bar, if the attorney in question had testified that the supreme court of Montana had construed the statute in question in a certain manner, or that said court had never passed upon said statute, but that some certain court or courts of general jurisdiction in said state had construed it in a certain manner, and that it had not been construed differently by other courts of that state, this perhaps would have been competent evidence. But the evidence, as given by this witness, was indefinite and uncertain, and purported to be principally his own opinion as to the meaning of the statute to which his attention was called, and his conception of what the consensus of opinion of the bench and bar was touching the construction of said statutes.

Respondents contend that the foreclosure decree of the circuit court of Silver Bow county, Montana, is not, as to the fact of foreclosure, conclusive upon the court here, because that proceeding was commenced by service of summons by publication, and the record does not show that the ³⁸¹ summons was published in the manner and for the length of time required by the statutes of this state. The constitution of the United States requires each state of the Union to give full faith and credit to the judicial proceedings of every other state of the Union. It must, therefore, be presumed that all of the requirements of the statutes of Montana were taken before this judgment and decree of foreclosure was rendered. Being in the nature of a proceeding in rem, and no personal judgment being sought or taken against the respondents themselves, the court could properly acquire jurisdiction to render the decree of foreclosure upon the property in that state

without having personal service upon the respondents. Service by publication was sufficient; and the judgment being fair and regular upon its face, it will be presumed to have been made and entered pursuant to all the requirements of the statutes of that state. Respondents' contention that the question as to whether or not there had been a foreclosure of the mortgage was for the jury is incorrect. It was for the trial judge to say whether or not the record of this decree was properly authenticated to be received as evidence. Having decided that it was, and the same having been admitted, its effect was conclusive of the fact of foreclosure, and that question no longer remained an open issue in the case. Greenleaf on Evidence, fourteenth edition, section 502, note 3, says: "Where a domestic record is put in issue by the plea, the question is tried by the court, notwithstanding it is a question of fact. And the judgment of a court of record of a sister state in the Union is considered for this purpose as a domestic judgment."

Upon the question of the conclusiveness of the judgment of the Montana court, see *Galpin v. Page*, 85 U. S. 371, 21 L. ed. 959; *Quarl v. Abbett*, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476; 1 *Freeman on Judgments*, 4th ed., ³⁸² pp. 190, 191, secs. 120a, 565; *Brown on Jurisdiction*, sec. 20a, note 1; *Evers v. Watson*, 156 U. S. 532, 15 Sup. Ct. Rep. 430, 39 L. ed. 520; *Trowbridge v. Spinning*, 23 Wash. 48, 83 Am. St. Rep. 806, 62 Pac. 125, 54 L. R. A. 204; *Dormitzer v. German Sav. etc. Soc.*, 23 Wash. 132, 194, 62 Pac. 862; *Fidelity Ins. etc. Co. v. Nelson*, 30 Wash. 340, 70 Pac. 961; *Voorhees v. Bank of United States*, 10 Pet. 449, 9 L. ed. 490.

As to the effect of a statute of exemptions, we may say that if the obligation, when it was created, constituted a liability against the wife, then the only exemptions which she is entitled to are those provided by the statutes of the state where she resides and is sued. In the case of *La Selle v. Woolery*, 14 Wash. 70, 53 Am. St. Rep. 855, 44 Pac. 115, 32 L. R. A. 73, this court said: "The settled rule is that the law of the place where the contract was made must govern in determining the character, construction and validity of such contract; while the law of the place where suit is instituted upon the contract governs as to the 'nature, extent and form of the remedy, . . . whether arrest of the person or attachment of the property may be allowed; whether a debt is or is not discharged by operation of law, as insolvent laws, or

barred by statutes of limitation; rights of setoff; the admissibility and effect of evidence; the modes of proceeding and the forms of judgment and execution': 2 Abbott's Law Dictionary, p. 36."

In the case of *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. Rep. 102, 27 L. ed. 104, the supreme court of the United States used the following language: "The rule deduced by Mr. Wharton, in his *Conflict of Laws* [section 401], as best harmonizing the authorities and effecting the most judicious result, and which was cited approvingly by Mr. Justice Hunt in *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245, is, that 'obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum*; in respect to ~~388~~ their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law.' This, it will be observed, extends the operation of the *lex fori* beyond the process and remedy, so as to embrace the whole of that residuum which cannot be referred to other laws. And this conclusion is obviously just; for whatever cannot, from the nature of the case, be referred to any other law, must be determined by the tribunal having jurisdiction of the litigation, according to the law of its own locality."

In 22 *American and English Encyclopedia of Law*, second edition, 1383, the author says: "The *lex fori* governs in all matters relating to the remedy and the course of procedure." In *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 831, 34 L. ed. 210, it was said: "Assuming that the mortgagee has acquired by the law of New York a right to enforce such an agreement against a grantee of the mortgagor, the form of his remedy, whether it must be in covenant or in assumpsit, at law or in equity, is governed by the *lex fori*, the law of the District of Columbia, where the action was brought: *Dixon v. Ramsay*, 3 Cranch, 319, 324, 2 L. ed. 453; *United States Bank v. Donnally*, 8 Pet. 361, 8 L. ed. 974; *Wilcox v. Hunt*, 13 Pet. 378, 10 L. ed. 209; *Leroy v. Beard*, 8 How. 451, 12 L. ed. 1151; *Pritchard v. Norton*, 106 U. S. 124, 130, 133, 1 Sup. Ct. Rep. 102, 27 L. ed. 104."

These authorities show that the liability of a person upon a note or other obligation is fixed and determined by the law of the place where such obligation is created, but that all mat-

ters appertaining to the enforcement of the remedy are controlled by the law of the forum.

For the reasons hereinbefore set forth, the judgment of the honorable superior court is reversed, and the cause remanded for further proceedings, not inconsistent with ³⁸⁴ this and the decisions heretofore rendered in this case by this court.

Mount, C. J., Crow, Dunbar and Rudkin, JJ., concur.

Hadley and Fullerton, JJ., took no part.

A Judgment Based upon Constructive service of process has the same effect in other states as in that where it was authorized and rendered: See the monographic note to Montgomery v. Consolidated Boat Store Co., 103 Am. St. Rep. 307, on judgments of the courts of sister states.

That the Right to Exemptions from execution is generally governed by the law of the forum, see Goodwin v. Claytor, 137 N. C. 224, ante, p. 479, and cases cited in the cross-reference note thereto.

WERTHEIMER-SWARTS SHOE COMPANY v. HOTEL STEVENS COMPANY.

[38 Wash. 409, 80 Pac. 563.]

INNKEEPERS' Liens—Salesmen's Samples—Estoppel.—The fact that hotel-keepers admit an extensive acquaintance with traveling salesmen for wholesale houses and their methods of doing business, and that they never knew of an instance in which such a salesman owned the samples that he carried, is evidence of knowledge of a custom so universal as to estop such hotel-keepers, in an attempt to assert an innkeeper's lien against such samples, from asserting their ignorance of the ownership of the samples, if they failed to make inquiry as to title before trusting the salesman on the strength of his interest therein. (p. 866.)

INNKEEPERS—Lien of.—An inn or hotel keeper, who knows that the property in possession of a guest does not belong to him, but is the property of a third person, can have no lien thereon. (p. 867.)

INNKEEPERS—Lien of.—A statute giving an innkeeper a lien on "the baggage, property, or other valuables" of his guest, does not confer a lien on the samples of a traveling salesman, known by the innkeeper to be the property of the employer of such salesman. (p. 868.)

Ballinger, Ronald & Battle, for the appellant.

Brady & Gay, for the respondent.

⁴¹⁰ FULLERTON, J. This is an action in replevin, brought by the respondent against the appellant, to recover the possession of two sample cases and one box, each containing samples of boots and shoes, such as are usually carried by a traveling salesman of a wholesale dealer in such merchandise. The respondent recovered judgment in the court below, and this appeal is prosecuted therefrom.

From the record it appears that the appellant is the proprietor and manager of two hotels, in the city of Seattle, known as the Hotel Stevens and the Hotel Seattle; that on July 1, 1902, one A. M. Somerfield, who was then in the employ of the respondent as a traveling salesman, together with his wife, engaged a room at the Hotel Stevens, at the agreed price of thirty dollars per month, and that he continued to occupy the same from that time until October 25, 1902; and that, while Somerfield was stopping at the Hotel Stevens, he engaged a sample room at ⁴¹¹ the Hotel Seattle, which he occupied for some months, agreeing to pay therefor the sum of one hundred and twenty-six dollars and ninety cents. In the meantime the appellant paid for Somerfield certain laundry bills and telegrams, and advanced him certain sums of money, so that, when Somerfield left the Hotel Stevens, the total amount owing the appellant, after deducting partial payments, was two hundred and sixty-nine dollars and five cents. At the time Somerfield engaged the rooms of the appellant, he had in his possession the personal property above mentioned, and the same was brought into the sample rooms of the Hotel Seattle, and there used by Somerfield, during the time he occupied the room, in making sales of the respondent's goods. When Somerfield sought to remove the property from the hotel, the appellant seized and detained it, claiming a lien thereon for the amount of Somerfield's indebtedness to it, under the statute giving to hotel-keepers and others a lien on the baggage and property of their guests, to secure the payment of their reasonable charges for the accommodations furnished them.

The foregoing facts are undisputed. The court, however, in addition thereto, found that the appellant, at the time it received Somerfield as a guest, had knowledge that this property was the property of the respondent, and this finding is challenged by the appellant as not supported by the evidence. But we think the clear weight of the evidence is with the finding. In fact, no other conclusion can be drawn from the

testimony of the appellant's officers themselves. They each admit an extensive acquaintance with traveling salesmen, and their methods of doing business, and say that they never knew of an instance in which a traveling salesman of a whole-sale house owned the samples that he carried. This, it is true, may not be evidence that these officers knew who had title to the property in this particular instance, but it does show ⁴¹² knowledge of a custom so universal as to estop them from asserting their ignorance, if they failed to make inquiry as to title before trusting the guest on the strength of his interest in the property.

The statute regulating the liens of hotel-keepers, innkeepers, etc., is as follows: "Hereafter all hotel-keepers, innkeepers, lodging-house keepers, and boarding-house keepers in this state shall have a lien upon the baggage, property, or other valuables of their guests, lodgers, or boarders brought into such hotel, inn, lodging-house, or boarding-house by such guests, lodgers, or boarders, for the proper charges due from such guests, lodgers, or boarders for their accommodation, board, or lodging, and such other extras as are furnished at their request, and shall have the right to retain in their possession such baggage, property, or other valuables until such charges are fully paid, and to sell such baggage, property, or other valuables for the payment of such charges in the manner provided in the next succeeding section of this chapter": Ballinger's Code, sec. 5975.

The appellant argues that, under this section, the hotel-keeper's lien attaches to all property the guest brings into the hotel, regardless of whom the title to the same may rest in, or of the fact that the hotel-keeper knows who holds such title, provided the property is in the rightful possession of the guest, and subjected to his care. To support its contention the appellant cites Schouler on Bailments and Carriers, sec. 326, and Manning v. Hollenbeck, 27 Wis. 202. These authorities maintain that at common law an innkeeper had a lien upon the property of his guest, to secure his reasonable charges, even where the innkeeper knew that the property belonged to a third person, and that the guest himself had only a bailee's interest therein, provided that the innkeeper received the property on the faith of the innkeeping relation. Whether this is ⁴¹³ the general rule, as applied in this country, we think may be fairly doubted: Cook v. Kane, 13

Or. 482, 57 Am. Rep. 28, 11 Pac. 226; Covington v. Newberger, 99 N. C. 523, 6 S. E. 205; Singer Mfg. Co. v. Miller, 52 Minn. 516, 38 Am. St. Rep. 568, 55 N. W. 56, 21 L. R. A. 229.

But the question is not material here. The appellant's rights are to be measured by the statute, and not by the common-law rule. At common law there was no lien on the part of an innkeeper for such accommodations as the appellant furnished to Somerfield. An innkeeper was allowed a lien at common law only where he furnished accommodations to a guest proper—that is, one “entertained from day to day, as it were, coming and going as he pleases, being transient, and having no bargain for a fixed time”—but was not allowed a lien for furnishing accommodations to a mere lodger, as Somerfield was in this instance.

Turning to the statute, it will be observed that a lien is given to hotel-keepers “upon the baggage, property, or other valuables of their guests.” It is not extended to the property of third persons, even though such property be brought into the hotel by the guest, and the hotel-keeper be ignorant of its true ownership. It may be that were the property such as a guest ordinarily carries, and the hotel-keeper entertained him on the faith of such property, in ignorance of its true ownership, that the lien would attach, but this is as far as the rule could extend. There can be no lien under the statute where the hotel-keeper knows that the property in possession of the guest is not the guest's property, but is the property of a third person.

The cases, generally, where like and similar statutes have been construed, lay down the foregoing rule. In McClain v. Williams, 11 S. Dak. 227, 74 Am. St. Rep. 791, 76 N. W. 930, 49 L. R. A. 610, it was held that a statute giving ⁴¹⁴ an innkeeper a lien on the property “belonging” to a guest, did not give a lien on property in possession of the guest belonging to a third person. The court also held that to give a lien for the board of a guest, on a third person's property loaned or leased to the guest, would be depriving one of his property without due process of law. On this last question, however, the supreme court of Iowa has laid down a different rule: See Brown Shoe Co. v. Hunt, 103 Iowa, 586, 64 Am. St. Rep. 198, 72 N. W. 765, 39 L. R. A. 291.

In Torrey v. McClellan, 17 Tex. Civ. App. 371, 43 S. W. 64, it was held that a statute reading as follows: “Proprietors

of hotels and boarding-houses shall have a specific lien upon all property or baggage deposited with them for the amount of the charges against them or their owners, if guests at such hotels and boarding-houses," did not give a hotel-keeper a lien on samples carried by a traveling salesman, belonging to his employer, for the bill of the salesman incurred for board and lodging at the claimant's hotel.

In *Wyckoff v. Southern Hotel Co.*, 24 Mo. App. 382, it was held that a statute giving an innkeeper a lien on the "baggage and other valuables of the guest," did not give a lien upon goods of a third person, taken to the inn by the guest.

The only other case called to our attention involving this question where a statute was construed is *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 64 Am. St. Rep. 198, 72 N. W. 765, 39 L. R. A. 291. It was there held that a statute giving to innkeepers a lien on all property "belonging to, or under the control of their guests," was sufficiently broad to include samples brought to a hotel by a traveling salesman, although the innkeeper knew, at the time he received the salesman as a guest, that the samples did not belong to him, but belonged to his employer; the court holding, ⁴¹⁵ as before remarked, that such a statute did not deprive the owner of his property without due process of law. This case, however, is distinguishable from the case at bar, and those last above cited, in that the statute construed expressly provides for a lien on the property of third persons, while the others do not so provide.

The conclusion reached renders it unnecessary to discuss the other errors assigned. The judgment is affirmed.

Mount, C. J., Hadley and Dunbar, JJ., concur.

Rudkin, Root and Crow, JJ., took no part.

INNKEEPERS' LIENS.

- I. Existence, 869.**
- II. Waiver or Loss of Lien, 869.**
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- V. Boarding-house Keeper's Lien.**
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 - a. Generally, 874.**
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I. Existence.

The law imposes extraordinary liabilities upon hotel and inn keepers, and in return clothes them with the extraordinary privilege of a lien on the effects of their guests for the amount of reasonable charge for their keeping and entertainment. This lien exists by reason of the common law, and in many jurisdictions also by express declaration of the statute. The rule as generally expressed is that an innkeeper has a lien upon the baggage or goods of the guest brought by him to such inn, for the amount due by the guest to the innkeeper for board and lodging and entertainment furnished the former: *Swan v. Bournes*, 47 Iowa, 501, 29 Am. Rep. 492; *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 64 Am. St. Rep. 198, 72 N. W. 765, 39 L. R. A. 291; *Watson v. Cross*, 2 Duvall, 147; *Black v. Brennan*, 5 Dana (Ky.), 310; *Stanwood v. Woodard*, 38 Me. 192; *Danforth v. Pratt*, 42 Me. 50; *Case v. Fogg*, 46 Mo. 44; *Dunlap v. Thorne*, 1 Rich. 213; *Manning v. Hollenbeck*, 27 Wis. 202. The only case found in opposition to this doctrine is that of *Carlisle v. Quattlebaum*, 2 Bail. 452, wherein it was held, perhaps inadvertently, that "an innkeeper has no right to detain the property of his guest, though he may detain his person." This case was never considered authority even in South Carolina, and is thus referred to in *Dunlap v. Thorne*, 1 Rich. 213, where the court in speaking of it said: "That case does not rule that an innkeeper has no lien on the goods of his guest for the payment of his bill. The true principle upon which it rests is, that *Quattlebaum* was not an innkeeper and therefore not entitled to the rights and remedies of one." The lien of the innkeeper extends even to infant guests, and an innkeeper has a lien on the baggage of his infant guest for the price of his entertainment, and also for money furnished the infant and expended by him in procuring necessities: *Watson v. Cross*, 2 Duvall, 147. It is essential to the existence and maintenance of the lien that the goods on which it is claimed should have been brought to the hotel or inn by a person coming in the character of a guest: *Pollock v. Landis*, 36 Iowa, 651; *Stanwood v. Woodward*, 38 Me. 192; *Hurst v. Byers*, 29 Mo. 469; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663.

II. Waiver or Loss of Lien.

The lien in favor of an innkeeper consists in his right to retain the possession of the chattels in opposition to the title of the owner until the charge respecting them is paid, and if the possession is voluntarily surrendered, without fraud, to the guest or owner, the lien is at an end: *Hickman v. Thomas*, 16 Ala. 666. The lien may be waived or lost by voluntarily parting with the possession of the goods, or it may be surrendered by agreement of the parties, but an

the lien is regarded as of value, such agreement, in order to be binding, must be based upon a legal consideration: *Danforth v. Pratt*, 42 Me. 50. And a verbal agreement, not executed, of an innkeeper to surrender the goods in consideration of the promise of a third person to pay the bill of the guest, is not a waiver of the lien: *Danforth v. Pratt*, 42 Me. 50. If an innkeeper, without any fraud being practiced upon him, accepts a draft drawn by the guest in payment of his bill, and voluntarily relinquishes possession of the goods, his lien is lost and will not revive even if the goods come again into his possession, but if he is induced to part with his possession by fraudulent representations of the guest, there is no waiver of the lien: *Manning v. Hollenbeck*, 27 Wis. 202. It has also been held that an innkeeper's lien is not waived by a failure to assert it, on refusing to deliver the goods held to a chattel mortgagee when possession was demanded under the mortgage: *Corbett v. Cushing*, 15 Daly, 170. A sale, made in good faith, of property held under the lien, without the knowledge of the boarding-house keeper, does not terminate the lien, but it remains valid, and effectual for board furnished after such sale, under the original contract, until notice of the sale is given or the property removed: *Bayley v. Merrill*, 10 Allen, 360.

III. Against Whom Lien Exists.

The lien of an innkeeper on property intrusted to him to be kept depends upon the question whether or not it is the property, or accepted as the property, of one who is a guest of such innkeeper, actually or constructively. If he is such guest, as distinguished from a mere lodger or boarder, or person bearing some other relation to the innkeeper, the lien attaches; otherwise it does not: *Hickman v. Thomas*, 16 Ala. 666; *Wall v. Garrison*, 11 Colo. 515, 19 Pac. 469; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663; *Elliott v. Martin*, 105 Mich. 506, 55 Am. St. Rep. 461, 63 N. W. 525; *Fox v. McGregor*, 11 Barb. 41. It is not deemed necessary to here point out the difference between a guest and a boarder, or person bearing some other relation to the innkeeper. That has already been done in the note to *Tulane Hotel Co. v. Holohan*, 105 Am. St. Rep. 932-940. Upon the goods of a guest, an innkeeper has a lien, but upon those of a mere boarder he has not: *Pollock v. Landis*, 36 Iowa, 651. In other words, he has a lien upon the goods of guests only, but not upon the goods of persons boarding with him under a special contract: *Hurst v. Byers*, 29 Mo. 469. He cannot detain the property of a boarder for the price of his board, though he may those of a traveler or guest: *Ewart v. Stark*, 8 Rich. 423. To the same effect is *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 38 Am. St. Rep. 568, 55 N. W. 56, 21 L. R. A. 229, where it is further held that evidence which merely shows that a man and his family were received as boarders and lodgers at a hotel, and continued to board and lodge there for about six months at a weekly rate, does

not affirmatively establish the relation of guest and innkeeper so as to give the hotel-keeper a right of lien: *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 38 Am. St. Rep. 568, 55 N. W. 56, 21 L. R. A. 229. It has been held, however, that even if the person stopping at an inn is a boarder merely, the innkeeper is entitled to a lien for the amount due him: *Smith v. Keyes*, 2 Thomp. & C. 650.

IV. Enforcement of Lien.

At common law an innkeeper's remedy by way of a lien on his guest's effects extended no further than to give him the right to detain and withhold such property until payment of his charges. He could not sell the chattels retained. Otherwise expressed, an innkeeper has a lien on the baggage or other personalty of his guest brought to his inn, for the payment of the guest's bill, but the innkeeper has no power to enforce such lien by sale without judicial process: *Case v. Fogg*, 46 Mo. 44. Or the fact that a hotel-keeper to whom baggage checks have been delivered, would have a lien upon such baggage for the bill of the guest, would give him no authority to dispose of the property as his own, and would not justify his conversion of the property to his own use: *People v. Husband*, 36 Mich. 306. An innkeeper cannot at common law sell his guest's property for his keeping: *Fox v. McGregor*, 11 Barb. 41. There is nothing, however, to prevent the innkeeper from obtaining a judgment at law for the amount due him from his guest, and enforcing such judgment by execution against the goods held by him under his lien: *Brooks v. Harrison*, 41 Conn. 184; *Gildea v. Earl*, 2 City Ct. Rep. (N. Y.) 122; *Gump v. Showalter*, 43 Pa. St. 507. If an innkeeper obtains a judgment in a justice's court establishing his lien, the circuit court, as a court of equity, has jurisdiction of a suit brought by him based on the lien thus established to settle conflicting claims to the property, and to enforce the lien in the manner deemed just and right by it: *Coates v. Acheson*, 23 Mo. App. 255. An innkeeper has a remedy to enforce his lien by an action in the nature of a bill in chancery: *Fox v. McGregor*, 11 Barb. 41. A court of equity has jurisdiction to enforce liens and pledges of personal property, and may order the sale of the property of an innkeeper's guest to pay charges: *Black v. Brennan*, 5 Dana (Ky.), 310. To enforce an alleged lien on the baggage or property of a guest, for charges for his entertainment, board or lodging, the plaintiff must allege specifically in his petition or complaint that he is a hotel or inn keeper, otherwise his pleading must be deemed insufficient: *Southwood v. Myers*, 3 Bush, 681. If an innkeeper sets up a lien for the keeping of horses left with him by a third person, an averment in a plea that he was then the keeper of a public inn, and as such received the horses, is equivalent to an averment that the person leaving the horses was a traveler or guest: *Peck v. McCraw*, 25 Wend. 653. And an allegation that one boarded with the

innkeeper does not of itself affirmatively show that he was entertained in the character of a boarder as distinguished from a guest; *Pollock v. Landis*, 36 Iowa, 651.

V. Boarding-house Keeper's Lien.

The keepers of boarding-houses were not subject at common law to the extraordinary liabilities imposed upon innkeepers, and consequently were not entitled to the corresponding privilege of a lien on the effects of their boarders for the payment of the board due or to become due: *Southwood v. Meyers*, 3 Bush, 681; *Reed v. Teneyek*, 103 Ky. 65, 44 S. W. 356; *Cochrane v. Schryver*, 12 Daly, 174. But statutes now exist almost everywhere creating such lien in favor of boarding-house keepers. Such is the case in New York, for instance; and "it is only the keepers of boarding-houses as such that come within this statute. The distinction between an inn and a boarding-house has been held to be, that in a boarding-house the guest is under an express contract, at a certain rate, for a certain period of time, while at an inn, the guest being on his way, is entertained from day to day, according to his business, upon an implied contract. An innkeeper is bound to receive everyone who applies, if in a fit condition to be received, while a boarding-house keeper is not bound to receive anyone, except upon a special contract. . . . But a boarding-house is not, in common parlance, or in legal meaning, every private house where one or more boarders are kept occasionally only, and upon special considerations. But it is a quasi public house, where boarders are generally and habitually kept, and which is held out and known as a place of entertainment of that kind": *Cady v. McDowell*, 1 Lana. 484. Such statutes only give the keeper of the boarding-house a lien upon, and right to detain, the baggage and effects of a boarder for the amount which may be due by him, to the same extent and in the same manner as innkeepers have a lien. The lien is thus limited to that for board actually due, and generally does not include board to become due under an agreement to board in future, nor can the lien be extended to any other indebtedness, nor to any demand not due at the time of the detention: *Shafer v. Guest*, 35 How. Pr. 184. A boarding-house keeper has no lien upon the baggage of his guest, nor the right to hold it to secure the payment of a demand, except for board and lodging: *Hanlin v. Walters*, 3 Colo. App. 519, 34 Pac. 688. A boarding-house keeper has a lien upon the horse of his boarder for the fare and board of the latter, but not for the keeping of the horse: *Cross v. Wilkins*, 43 N. H. 332. A boarding-house keeper is given a lien upon the goods of his boarder, to the extent of the board due, without reference to the character of the guest whether he is a transient or a permanent boarder: *Stewart v. McCready*, 24 How. Pr. 62; *Misch v. O'Hara*, 9 Daly, 361. In other words, under statute creating boarding-house keeper's liens, the keeper of a boarding-house

has a lien upon the baggage and effects of his boarder, for the amount due for his board, of the same character and extent as that which an innkeeper has at common law upon the goods of his guest, who is a traveler, or wayfaring person: *Jones v. Morrill*, 42 Barb. 623; *Nichols v. Halliday*, 27 Wis. 406. It has been held that a boarding-house keeper has a lien for board upon goods brought upon the premises by the boarder to furnish his room, although they in fact do not belong to the boarder, but to a stranger: *Jones v. Morrill*, 42 Barb. 623. A keeper of a boarding-house having a lien upon a trunk for board does not, it seems, lose such lien by sending the trunk out of the state, under instructions not to deliver it until such claim for board is paid: *Jaquith v. American Express Co.*, 60 N. H. 61. Such lien upon the property of the boarder brought by him to the boarding-house is not lost by a sale of the property in good faith to a third person, without the knowledge of the boarding-house keeper, and such lien is valid and effectual for board furnished after such sale, under the original contract for board, until notice of the sale is given, or the property removed: *Bayley v. Merrill*, 10 Allen, 360. If a guest of a boarding-house keeper pays board by the week, and by his contract nothing is due until the end of the week, the lien attaches in the meantime, nevertheless: *Smith v. Colcord*, 115 Mass. 70. Such lien applies to all cases of special contracts for board made with a boarding-house keeper, at a fixed rate by the week or month, although an innkeeper would, under such circumstances, have no lien: *Misch v. O'Hara*, 9 Daly, 361.

The keeper of a boarding-house has no lien on the separate property of a married woman boarding at his house, and living apart from her husband, when such husband has engaged, and by express agreement promised to pay, her board: *Baker v. Stratton*, 52 N. J. L. 277, 19 Atl. 661. Nor has a boarding-house keeper, who has furnished board and lodging to the wife and child of a man who has driven them from home by his cruelty and neglect any lien for such board and lodging on the property of a man whom they brought with them to such boarding-house: *Mills v. Shirley*, 110 Mass. 158.

In some jurisdictions boarding-house keepers are given a lien on the wages of their boarders for the price of the entertainment furnished: *Hawk v. Rock*, 14 Pa. Co. Ct. Rep. 490; *Weisman v. Weisman*, 133 Pa. St. 89, 19 Atl. 300; *Walker v. Kennedy*, 20 Pa. Co. Ct. Rep. 433; but it has also been held that a statute exempting wages for the last thirty days is not repealed by a statute giving boarding-house keepers a lien upon the wages of their guests, and in such case the lien cannot be enforced by garnishment of such wages: *Hodo v. Benecke*, 11 Mo. App. 393. This rule has, however, been changed by statute, and such wages are now subject to garnishment: *Clark v. Haydock*, 44 Mo. App. 367. It has also been held that the lien of a boarding-house keeper extends to property of a guest which is ex-

empt from levy and sale on execution: *Thorn v. Whitbeck*, 11 Misc. Rep. 171, 32 N. Y. Supp. 1088. And again this rule has also been denied: *Smith v. McGinty*, 101 Pa. St. 402.

a. **Enforcement of Lien.**—In those jurisdictions where a lien is given by statute to boarding-house keepers and a mode of enforcing it is prescribed, such mode is exclusive of all others, and must be followed, under the principle that where a statute creates a right, and provides a remedy for the enforcement of it, that remedy must be pursued, unless the remedy given by statute is not adequate, and not merely when it is uncertain, incomplete or difficult, and when the statute provides a complete and adequate remedy for the enforcement of the lien, that remedy is exclusive in the court named, and no other court has jurisdiction of it either as a court of equity or otherwise: *Coates v. Acheson*, 23 Mo. App. 255.

VI. Lodging-house Keepers.

A person who keeps a mere lodging-house, or even one who keeps a house for lodging strangers for a season, as visitors to watering places, unless he is also the keeper of an inn or tavern, does not possess the privilege of retaining and detaining the goods of his guests until his charges for their lodgings are paid: *Southwood v. Myers*, 3 Bush, 681. A keeper of a lodging-house simply is not an innkeeper, and therefore not entitled as such to a lien upon the property of one to whom he has let rooms, and as the mere keeper of a lodging-house he is not entitled to such a lien, as lodging-house keepers have no lien upon the property of their lodgers either at common law or under the statutes giving such lien to innkeepers and boarding-house keepers: *Cochrane v. Schryver*, 12 Daly, 174; *Hardin v. State* (Tex. Cr. App.), 84 S. W. 591.

VII. To What Property Lien Attaches.

a. **Generally.**—Obviously, generally speaking, on common-law principles and in the absence of statutory regulations, all the property belonging to the guest as his own individual property and brought by him to the inn or hotel is subject to the innkeeper's lien. This proposition is embraced in the general rule stated above as to the existence of the right of lien: *Stanwood v. Woodward*, 38 Me. 192; *Case v. Fogg*, 46 Mo. 44; *Dunlap v. Thorne*, 1 Rich. 213.

b. **Property Exempt from Execution** is nevertheless subject to the innkeeper's lien, at least in a case where the exemption is statutory, and the statute exempts only from general execution: *Swan v. Bournes*, 47 Iowa, 501, 29 Am. Rep. 492. "The defendant contends that the goods in question, or some of them, are exempt from levy and sale under execution, and that, therefore, the defendant had no lien on them for board. It is immaterial whether these goods, or any of them, were exempt from levy and sale on execution or not. A lien may

exist either by express contract or by operation of law on personal property that is exempt from levy under an execution. The rule is that the lien of an innkeeper, which is identical with that of a boarding-house keeper, extends to property of the guest which is exempt from execution, such as a coat, for whose recovery replevin is brought against the innkeeper": *Thorn v. Whitbeck*, 11 Misc. Rep. 175, 32 N. Y. Supp. 1088.

But it has also been held that a statute exempting wages for the last thirty days is not affected by a statute giving innkeepers a lien upon the wages of their guests, and in such case the guests' wages cannot be taken by garnishment to satisfy the lien, if they were earned within the last thirty days: *Hodo v. Benecke*, 11 Mo. App. 293. However, the case last cited is no longer authority because under a later statute the lien may be enforced by garnishment of such wages: *Clark v. Haydock*, 44 Mo. App. 367.

c. **Wages of Guests.**—In some jurisdictions the lien of the innkeeper is extended by statute so as to include the wages of the guest, but such a lien is purely statutory and did not exist at common law: *Coates v. Acheson*, 23 Mo. App. 255; *Clark v. Haydock*, 44 Mo. App. 367. The lien may be enforced by garnishment of the wages of the guest: *Clark v. Haydock*, 44 Mo. App. 367. Under the Pennsylvania statute, wages of a guest are attachable on a judgment obtained against him for board, and when the amount claimed is for board for four weeks or less, the judgment defendant is not entitled to any exemption: *Weisman v. Weisman*, 133 Pa. St. 89, 19 Atl. 300; *Smith v. Dingus*, 12 Pa. Co. Ct. Rep. 299; *McCarthy v. Dougherty*, 16 Pa. Co. Ct. Rep. 86; *Dillin v. Treverton*, 16 Pa. Co. Ct. Rep. 89.

d. **Stolen Property.**—An innkeeper, at common law, had a lien upon a horse brought to his inn by his guest, and kept, until a reasonable charge for the keeping of such horse is paid, although the horse when thus brought to the inn was stolen property: *Domestic Sewing Machine Co. v. Watters*, 50 Ga. 573; *Black v. Brennan*, 5 Dana, 310. "It being the duty of an innkeeper to receive and provide for the horse of a traveler who becomes his guest, the law, in consideration of this duty, gives him a lien upon the horse for his compensation, and as the effect of this lien is, that he may refuse to deliver the horse to his guest until the charges of his keeping are paid, it would seem clear that, if the guest go off leaving his horse, the innkeeper is not bound to turn him out, and thus give up his lien, but may still keep him, looking to his lien for remuneration. And further, as the innkeeper cannot investigate the title of property brought by his guests, and is bound, unless there is something to excite suspicion and put him on his guard, to receive it and keep it properly, as belonging to the guest who has it in possession, it seems also reasonable that, when the keeping of the property necessarily in-

volves expenses, as in the case of a horse, he should have a lien upon the property itself for the reimbursement of his reasonable expenditures in keeping and providing for it, although he keep it merely for his own security; and as this lien attaches to the horse in consideration of necessary services and expenditures in keeping him, it would seem that, in the absence of any circumstance to raise suspicion, it should subsist independently of any question of title, and must prevail against the true owner himself, though the horse had been stolen from him and taken to the inn by the thief": *Black v. Brennan*, 5 Dana, 312.

It has been held, however, that a statute giving a lien upon horses delivered to innkeepers for keeping and also the power to sell at public sale after the expense amounts to a certain sum, does not apply to a stolen horse left at the inn by the thief, and that such sale does not divest the title of the real owner: *Gump v. Showalter*, 43 Pa. St. 507.

e. **Horses Employed in Carrying Mail.**—The right of an innkeeper to detain the horse of his guest for his food does not extend to horses owned by individuals and employed in the transportation of the United States mail, nor to horses owned by the United States and employed in such service. No lien can exist against the government: *Hickman v. Thomas*, 16 Ala. 666; *United States v. Barney*, 2 Wheel. Cr. Cas. 513; affirmed on appeal, *United States v. Barney*, 3 Hughes, 545. In another case, however, the contrary rule was maintained, and it was there held that if two teams of horses belonging to a mail contractor engaged in carrying the United States mail were kept at the stable of an innkeeper, and one of such teams was removed therefrom, the innkeeper had a right to detain the other team for the keeping of both of them: *Young v. Kimball*, 23 Pa. St. 193. In such case the innkeeper has no lien upon the mail contractor's horse for the board of the driver, nor has he any lien upon the mail contractor's horse for the keeping of other horses which were hired and used in his business of carrying the United States mail: *McManigle v. Crouse*, 1 Walk. (Pa.) 43.

f. **Person of Guest.**—There is a dictum in an early case indicating that it was once thought to be the law that an innkeeper had the right to detain the person of his guest as a pledge for what was due him: *Carlisle v. Quattlebaum*, 2 Bail. 452. "It was once thought that he might detain the person of his guest, but that doctrine is now exploded and the lien is confined to the goods": *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663.

g. **Lien on Property of Third Person.**—As to whether an innkeeper has a lien on the property of a third person brought to the inn by the guest and upon which credit is extended to the guest, the cases are in hopeless conflict. So far as the weight of authority is concerned, it

establishes, what seems to us to be the better rule, that the lien of the innkeeper will attach to goods brought to the inn by a guest, though they are not really the guest's property if they were received by the innkeeper on the faith of the innkeeping relation, and though they are not the ordinary luggage or baggage of a common traveler, especially when the fact of the true ownership is not expressly known to the keeper of the inn: *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 64 Am. St. Rep. 198, 72 N. W. 765, 39 L. R. A. 291; *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 38 Am. St. Rep. 568, 55 N. W. 56, 21 L. R. A. 229; *Polk v. Mellenbacker*, 136 Mich. 611, 99 N. W. 867; *Waters v. Gerard*, 106 App. Div. 431, 94 N. Y. Supp. 702; *Singer Mfg. Co. v. Flennigan*, 7 Pa. Co. Ct. Rep. 45; *Covington v. Newberger*, 99 N. C. 523, 6 S. E. 205; *Manning v. Hollenbeck*, 27 Wis. 202. The rule above stated is well settled in England by a uniform line of authority: *Turrill v. Crawley*, 13 Q. B. 197, 66 Eng. Com. L. 197, 18 L. J. Q. B. 155; *Snead v. Watkins*, 1 Com. B., N. S., 267, 87 Eng. Com. L. 267, 26 L. J. C. P. 57; *Robins v. Gray*, [1895] 2 Q. B. 501.

The fact that goods in the possession of a guest at an inn belong to a third person does not prevent the innkeeper from having a lien thereon, provided he has no notice of such ownership: *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 38 Am. St. Rep. 568, 55 N. W. 56, 21 L. R. A. 229. An innkeeper has a lien on the property of a third person, held by his guest as bailee, and brought within the inn, unless the keeper of the inn knows that it is not the property of the guest: *Cook v. Kane*, 13 Or. 482, 57 Am. Rep. 28, 11 Pac. 226; *Covington v. Newberger*, 99 N. C. 523, 6 S. E. 205. If a guest takes to an inn property which he represents to the innkeeper as his own, but which is in fact the property of his principal, with which he is intrusted as agent, the innkeeper is entitled to a lien on the property for the amount due for the keeping and accommodation of the guest: *Polk v. Mellenbacker*, 136 Mich. 611, 99 N. W. 867. An innkeeper's lien, it has been held, attaches to a piano brought into a hotel by a guest therein, though the piano was bought by the guest on credit under a contract stipulating that the title thereto was to remain in the seller until the price was paid, and though the guest left the hotel after having leased rooms therein for a definite period at a definite rental, and without having paid for the piano. In such case the person furnishing property for the use of a guest in a hotel is presumed to do so with a knowledge of the law which gives to an innkeeper a lien on property brought by the guest into the hotel: *Waters v. Gerard*, 106 App. Div. 431, 94 N. Y. Supp. 702.

It is not essential to a hotel-keeper's lien on goods brought to the hotel by a guest that they actually belong to him; it is sufficient if he has them in his possession and exercises acts of ownership over them, especially where there is nothing to show that the hotel-keeper knew where, or under what circumstances the guest became possessed of

them: *Singer Mfg. Co. v. Flennigan*, 7 Pa. Co. Ct. Rep. 45. Perhaps the leading case on this side of the question is that of *Manning v. Hollenbeck*, 27 Wis. 202, where it was held that an innkeeper has a lien upon the baggage or goods brought to his house by a guest, for the amount due from the latter for board and lodging, and this even when the goods belong to a third person, but are lawfully in the possession of the guest.

A case whose holding and decision is in direct opposition to the principal case is that of *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 64 Am. St. Rep. 198, 72 N. W. 765, 39 L. R. A. 291, wherein it was held that a statutory lien given to innkeepers on all property "belonging to or under the control of their guests which may be in such hotel" attaches to samples and their receptacles carried by a traveling salesman, although the innkeeper knew at the time that he received the salesman as a guest that the samples did not belong to him, but to his employer.

This is the prevailing rule in England. In a case lately decided there, it appeared that a commercial traveler employed by a firm who dealt in sewing-machines went to stay at an inn, and while there machines were sent to him by his employers in the ordinary course of business to be sold to customers in the neighborhood. Before the goods were so sent the innkeeper had express notice that they were the property of the employers, but he received them as the baggage of the traveler, who subsequently left the inn without paying his bill for board and lodging, and it was held that the innkeeper had a lien upon the goods for the amount of his bill: *Robins v. Gray* (1895), 2 Q. B. 501.

A few cases are found which flatfootedly maintain the rule, that neither under the common law nor the statute will the innkeeper's lien attach to the property of a third person brought to the inn by the guest, so as to permit the keeper of the inn to detain such property for the amount due for the board and lodging of the guest: *Domestic Sewing-Machine Co. v. Watters*, 50 Ga. 573; *Wyckoff v. Southern Hotel Co.*, 24 Mo. App. 382; *Barnett v. Walker*, 39 Misc. Rep. 323, 79 N. Y. Supp. 859. These cases were decided without regard to the knowledge of the innkeeper as to the ownership of the property sought to be detained, but in *Torrey v. McClellan*, 17 Tex. Civ. App. 371, 43 S. W. 64, it was held in accord with the conclusion in the principal case that no lien for the board-bill of a drummer is acquired upon a drummer's samples contained in his trunks taken by him to a hotel, when the manager of the hotel knows that such contents do not belong to the drummer, although the statute gives hotel proprietors a specific lien on all property or baggage deposited with them for the amount of the charges against them or their owners, if guests of such hotel. It has also been held that a statute which provides that an innkeeper shall have a lien upon, and right to detain personal

property placed by his guests under his care, and that baggage and other property "belonging" to any person who shall abscond without paying his bill may be disposed of by the innkeeper to realize the amount due him, does not give him any lien on property leased by his guest of a third person, and left in the guest's room upon his leaving the inn: *McClain v. Williams*, 11 S. Dak. 227, 74 Am. St. Rep. 791, 76 N. W. 930, 49 L. R. A. 610. It has also been decided that neither under the common law nor by statute, in a case where the guest is received under a contract to furnish board for himself and his wife, who accompanies him, is the innkeeper given a lien upon her effects, brought to the inn by her, on the faith of such contract: *McIlvane v. Hilton*, 7 Hun, 594. And also that where several, such as a father and his two daughters, come in company and put up at an inn, the goods of one cannot be detained for the board of all, but only for his or her proportion: *Clayton v. Butterfield*, 10 Rich. 300.

A somewhat strange decision is that of *Elliott v. Martin*, 105 Mich. 506, 55 Am. St. Rep. 461, 63 N. W. 525, to the effect that if one not a guest and not the owner of an animal, delivers it to a hotel-keeper under an express agreement for its board, but without authority from the owner, the hotel-keeper has no lien for the keeping and care of the horse, under a statute providing that whenever any person shall deliver to another any animal to be kept or cared for, the latter shall have a lien thereon for its keeping and care, and may retain possession thereof until such charges are paid.

Some of the cases which decide that an innkeeper's lien does not extend to the goods of a third person brought to the inn by the guest, place their decision upon the ground that to maintain the contrary doctrine there is necessarily a violation of the constitutional provision and guaranty against depriving the citizen of his property without due process of law: *Barnett v. Walker*, 39 Misc. Rep. 323, 79 N. Y. Supp. 859; *McClain v. Williams*, 11 S. Dak. 227, 74 Am. St. Rep. 791, 76 N. W. 930, 49 L. R. A. 610. On the other hand, it is maintained with equal strenuousness that a statute giving to innkeepers a lien on all property under the control of, or brought into an inn by a guest, extends to the property of a third person thus brought in, and is not unconstitutional as depriving the owner of his property without due process of law: *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 64 Am. St. Rep. 198, 72 N. W. 765, 39 L. R. A. 291.

LAWSON v. VERNON.

[38 Wash. 422, 80 Pac. 559.]

FRAUD—False Representations—Knowledge.—If a person states as true, as of his own knowledge, material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know that his representations were false, or that he believed them to be true. (p. 884.)

VENDOR AND PURCHASER—False Representation as to Location of Land.—A false representation by the vendor as to the precise location of land sold and conveyed, relied and acted upon by the vendee, entitles the latter to recover his damages, although the vendor acted in good faith and the false representation arose through mistake. (p. 886.)

VENDOR AND PURCHASER—Misrepresentation as to Location of Land Conveyed—Measure of Damages.—False representations made by a vendor and relied upon by the vendee, as to the precise location of land conveyed, whether made with or without knowledge of their falsity entitle the vendee to recover such damages as have naturally and proximately resulted from such wrongful act. (p. 887.)

VENDOR AND PURCHASER—Misrepresentation as to Location of Land Conveyed—Measure of Damages.—If a vendor misrepresents the precise location of land conveyed, and the vendee relying thereon takes possession of the wrong land pointed out to him by his vendor as the land conveyed, and makes improvements thereon, he is, upon discovering the mistake, entitled to recover as his damages such sum as will compensate him for his labor and expense caused by such misrepresentation, no matter if the property purchased was more valuable than that occupied and improved. (p. 887.)

VENDOR AND PURCHASER.—False representations on the part of a vendor are not actionable even though relied upon by the vendee, if the means of knowledge was as open to the vendee as it was to the vendor. (p. 888.)

VENDOR AND PURCHASER—Representations of Vendor—Right to Rely Upon.—If land is overgrown with brush and trees and the survey stakes are destroyed, the vendee has a right to rely upon the representations of the owner in pointing out certain land as that which he offers for sale. (p. 888.)

G. E. de Steiguer, for the appellants.

J. P. Wall and Root, Palmer & Brown, for the respondents.

⁴²³ FULLERTON, J. The record discloses that, in the early part of July, 1900, the appellants, who were real estate dealers, in the city of Ballard, approached the respondent John Lawson and proffered to sell to him four certain lots, then owned by the appellant Lee, known and described as lots 26, 27, 28, and 29, in block 9, in Ballard

Park Addition to the city of Ballard. The lots were on the outskirts of the city of Ballard in an unimproved part of the city, and, together with the surrounding property, were overgrown with trees and brush, and overlaid with logs, so that the stakes originally put in to mark the lots and blocks could not be found. During the negotiations between the parties, the appellant Vernon took the respondent John Lawson to the place near where the lots were located, and pointed out to the respondent certain lots, which he said were the lots of his coappellant and the lots they purposed selling, but which, in fact, were lots owned by other persons, and some one hundred and sixty feet west of the lots owned by Lee. On returning, the respondent Lawson agreed to purchase the lots, and thereupon the appellant Lee executed a deed to him for the lots above described, assuring him that the lots pointed out to him by Vernon were the lots described in the deed. The deed was executed and delivered sometime in July, 1900, and a few weeks thereafter the respondents entered into possession of the lots pointed out by Vernon, and, between that time and the early part of the year 1903, cleared and fenced the same, dug a well thereon, set out thereon a number of fruit trees, and commenced the erection of a dwelling-house.

About the time they commenced building the house, ⁴²⁴ some of their neighbors told them that they were not upon the lots their deed described. The respondents thereupon took steps to ascertain the true location of the lots purchased by them, and finding they were upon other lots, they entered upon the lots actually conveyed, abandoning the lots first settled upon, together with the improvements they had placed on the same. There was evidence tending to show that the lots actually conveyed lay better, and were more valuable, than the lots the respondents claim were pointed out to them. There was testimony on the part of the appellants to the effect that the lots sold were the lots actually pointed out by Vernon, and the bill of exceptions, which, however, does not purport to contain all of the evidence, fails to show any motive on the part of appellants for pointing out other lots than the ones they had for sale and actually sold. It fails to show, also, what knowledge Vernon had of the location of the

lots at the time he undertook to point them out to the respondents.

The appellants requested the court to give the jury the following instructions:

“1. The claim of the plaintiffs in this case is that they purchased from the defendants certain real estate described in the complaint, but that the defendants showed certain other property to the plaintiffs and falsely, deceitfully, and fraudulently informed the plaintiffs that such other lots were in fact the lots which plaintiffs were about to buy. Before you can find for the plaintiffs in this action, you must find that in fact such representations were made, that they were false, that they were known by the defendants to be false, or were not made in good faith by the defendants, and that the plaintiffs relied upon the same.

“2. If you find that representations as to the location of the property were made which were not correct, but that the defendants were acting in good faith in making ⁴²⁵ such representations, then you must find a verdict for the defendants.”

“5. If you find that the location of the lots claimed to have been sold by defendants to the plaintiffs could have been readily ascertained by the plaintiffs, and that any mistake as to their location arose from the failure of the plaintiffs to avail themselves of any means readily accessible to them, then they cannot recover from the defendants in this action.

“6. The court instructs you that, if the plaintiffs are entitled to recover anything from the defendants in this action, the measure of damage and the amount of recovery to be determined by your verdict is the difference in value between the lots of land which plaintiffs claimed that the defendants pointed out to the plaintiffs as the land they were buying and the land actually described in the deed given to the plaintiffs. If the land so described in the deed was more valuable than the land pointed out, and if other facts exist entitling the plaintiffs to a verdict, then the amount of your verdict should be the amount in which the value of the land so pointed out exceeds the land actually described in the deed. On the other hand, if the land described in the deed was of the same value as the land so alleged to have been pointed out to the

plaintiffs, or was more valuable than the land so pointed out to the plaintiffs, then the plaintiffs would not be damaged by any mistake or misrepresentation as to the location of said land, and you should render a verdict for the defendants herein.

“7. If you render a verdict for the plaintiffs herein, you cannot take into consideration, in fixing the amount of such verdict, any work done or improvements made upon the property which plaintiffs claim was pointed out to them by the defendants, as any such work or improvements form too remote or speculative an element to be taken into consideration in a case of this kind.”

The court refused to give the requested instructions, but gave the following:

“1. If you believe, from the evidence, that the defendants, or either of them, prior to the sale of the property, ⁴²⁶ pointed out to the plaintiffs, or to either one of them, certain lands other than the lands described in the deed given by the defendants to the plaintiffs, and that the plaintiffs relied upon the information thus given, and went to trouble and expense and work improving the lands pointed out to them, and which they believed to be the property which they bought, then your verdict must be for the plaintiffs, and in such sum as you believe they were damaged, if they suffered any damage.

“2. If you find from the evidence, as a matter of fact, that prior to the date of sale the defendant Vernon pointed out certain lands to one of the plaintiffs which were not as a matter of fact the lots conveyed, and that plaintiffs believed they were the same lands, and were told by the said Vernon that they were the same lands, that plaintiffs are entitled to recover any damages which they sustained by reason of such misinformation, even if the said Vernon did not purposely mislead them; in other words, if the defendant Vernon made a mistake and pointed out the wrong property, even if his mistake were unintentional, yet he and his partner must be held for any pecuniary damage said mistake may have caused the plaintiff.

“3. The court permitted certain evidence to be introduced as to the nature and value of the property which was actually described in the deed, and upon which plaintiffs were living. That evidence was not admitted for

the purpose of proving in this suit any counterclaim or any justification, but merely upon the credibility of witnesses and the likelihood of certain transactions having or not having taken place. If you find that the defendants, or either of them, prior to the sale of the property, told the plaintiffs they would sell him the lots which he subsequently improved, and pointed out said lots to him and that plaintiffs, acting upon such representations and relying thereon, improved the said property, they are entitled to recover damages, regardless of the nature or value of the lots described in the deeds, and the value of said lots has nothing to do with the question of the amount of damages which should be awarded.

427 "4. If you find that the plaintiffs are entitled to damages in this cause, you must award them such amount as in your opinion would compensate them for the time, labor, trouble and expense to which they were put by reason of the result of such a mistake, and for any loss sustained by the plaintiffs because of their incurring such expenditure of time and money."

The jury returned a verdict in favor of the respondents for the sum of two hundred and fifty dollars, and a judgment was entered in their favor, from which this appeal is taken.

The appellant first assigns that the court erred in giving the second of the instructions given, and in refusing to give the first and second of the requested instructions. They argue that this is an action for false representations or deceit, and that a plaintiff, to recover in such an action, must not only show that the representations relied upon were false, but that the defendant knew them to be false at the time he made them; and the charge of the court in this case, he argues further, leaves out the elements of knowledge on the part of the defendants.

It seems to be the rule announced by the majority of the courts that representations, on which another relies to his injury, to be actionable, must be fraudulent as well as false. But the courts announcing this rule have taken somewhat advanced grounds on the question as to what constitutes fraudulent representations. The prevailing doctrine is that, if a person states as true, as of his own knowledge, material facts susceptible of knowledge, to one

who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know that his representations were false, or that he believed them to be true. The falsity and fraud consists in representing that to be true which he did not know to be true: *Cottrill v. Krum*, 18 Am. St. Rep. 549, note p. 560; 4 Sutherland on Damages, 3d ed., sec. 1169.

⁴²⁸ This court has gone, perhaps, even a step beyond this rule, where the false representations were made with reference to land conveyed. In *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73, the grantors represented that the tract of land described in the deed of conveyance contained thirty-six and one-half acres, whereas in fact it contained but twenty-six and one-half acres. It was held error to instruct the jury that the grantee could not recover damages suffered by him because of the falsity of the representation unless the jury believed that the grantor made them with the intent to deceive; and that the grantor was not liable if he was mistaken as to the number of acres the tract contained and believed what he said concerning it to be true. Arguendo, the court said:

“If the defendants relied upon the representations of the plaintiff, and were led to believe by such representations that lot 2 contained thirty-six and one-half acres, when in fact it only contained twenty-six and one-half acres, and were induced by such representations to purchase said lot as a lot of thirty-six and one-half acres, it makes no difference whether plaintiff knew such representations to be false or not, he is liable. If he knew the lot did not contain thirty-six and one-half acres, and represented to defendants that it did, he would be guilty of fraud and deceit; but if he did not know it, and believed that the representations he made were true, and defendants, acting upon such representations, were damaged because it eventuated that they were not true, the liability of the plaintiff would be the same. In neither case will he be allowed to retain the benefit flowing from his misrepresentation. Mr. Justice Story thus states the rule: ‘Whether a party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is

equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false.' "

In *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205, the ⁴²⁹ grantor represented to the grantee that the lots described in the deed of conveyance were one hundred feet in depth, as shown upon a recorded plat, when in fact they were but fifty feet in depth. It was held that the grantee could recover for the false representations, notwithstanding the grantor may not have known that his representations were false at the time he made them, the court remarking that the effect upon the grantee was the same whether the representations were true or false.

These cases sustain the instruction complained of in the case at bar, for it can make no difference in principle whether the false representation concerns the quantity of land conveyed, or the precise location of the land conveyed. Each is a representation of a material fact, calculated to deceive the grantee and induce him to act when he otherwise would not act, and there would be no reason in holding that the one is actionable when innocently made, while the other is not.

The appellant, however, contends that these cases have been overruled by the later case of *Northwestern S. S. Co. v. Horton*, 29 Wash. 565, 70 Pac. 59. That case holds that false representations as to the solvency of a third person are not actionable unless the representations are made with knowledge of their falsity, or are made positively and recklessly without knowledge whether they are true or false. The writer confesses that he had difficulty in reconciling the decision in this case with the decisions in the earlier cases, and for that reason did not concur in the opinion. The majority of the court, however, thought the cases differed so far in principle as to be distinguishable; the distinction pointed out being that the representations in the earlier cases involved only questions of fact, while the representations in the latter, being as to the solvency of a person, necessarily involved opinion, as ⁴³⁰ the question of solvency or insolvency of a person cannot ordinarily be subjected to precise facts. But, as we have said, the representations made in the case at bar fall within, and are controlled by, the rule of the earlier cases.

There was, therefore, no error in this part of the charge of the court.

It is next assigned that the court erred in instructing as to the measure of damages. The appellant contends that the correct rule is the excess in value of the land pointed out over that actually conveyed, and he argues that especially ought this to be the rule when the representations were made by the defendants without knowledge of their falsity. But the character of the representations, that is whether they are made with or without knowledge of their falsity, cannot affect the amount of the recovery. In this case, as in all others, the recovery should be commensurate with the injury; that is to say, the guilty party is to be charged with such damages as have naturally and proximately resulted from his wrongful act. In cases like the one at bar, these cannot be measured by the excess in value of the lots pointed out over those actually conveyed. This is doubtless one element of damage where the fact assumed exists, but it may be, and usually is, the least of the damages suffered by the person injured. It was to be supposed that the respondents here were buying this property for residence purposes, that they would improve it by clearing it of its brush and timber, that they would erect a dwelling-house thereon, and that they would plant it with fruit trees, berry bushes, and useful and ornamental shrubbery. To be compelled to abandon these was clearly a damage to the respondents, and a damage which was the natural and proximate result of the appellants' act.

Cases where this precise question is presented seem ⁴⁸¹ not to be many, but in *Carvill v. Jacks*, 43 Ark. 454, it was held that, where the vendee was induced to purchase by the vendor's false and fraudulent representations as to his title, the vendee could, on eviction, in an action for deceit against the vendor, recover the value of such improvements as he had made on the land as were consistent with the use for which he had purchased it. To the same effect is *Bryant's Ex. v. Boothe*, 30 Ala. 311, 68 Am. Dec. 117. In suits brought to rescind on the ground of deceit, the rule is general that recovery may be had for beneficial improvements put upon the land by the vendee: 29 Am. & Eng. Ency. of Law, 2d ed., 650. There can be

no sound reason why such damages should be allowed in the one form of action, and denied in the other. The principle involved in the court's charge was, therefore, free from error. While it may have been too broad as a general rule, it was not erroneous as applied to the facts of this case, as the evidence, shown by the bill of exceptions, was such that the jury could not have been misled by it.

Lastly, it is assigned that the court erred in refusing to instruct that the respondents could not recover, if they failed to avail themselves of means readily accessible to them, by which they could have avoided entering on the wrong land. This court has held, in common with many other courts, that false representations on the part of a vendor are not actionable, even though relied on by the vendee, if the means of knowledge was as open to the vendee as it was to the vendor: *Washington Cent. Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366; *Baker v. Bicknell*, 14 Wash. 29, 44 Pac. 107; *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, ⁴³² 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180.

But these cases are not in point in the case before us. Here the false representation was as to a material matter entirely without the knowledge of the respondents. As it was shown that the ground had been left to overgrow with brush and trees, and that the stakes of the original survey were destroyed, it was hardly possible for the respondents to locate the lots; hence they must of necessity rely on the representations of some one. Because they chose to rely on the representations of the appellants, the appellants cannot be heard to assert, as a means of escaping liability for making such representations, that the respondents should have gone to some one less reckless in their statements.

The judgment is affirmed.

Mount, C. J., Hadley and Dunbar, JJ., concur.

Rudkin, Root and Crow, JJ., took no part.

When a Person Makes an untrue representation as of his own knowledge, not knowing whether it is true or false, it is fraud: Bullitt v. Farrar, 42 Minn. 8, 18 Am. St. Rep. 485. Or he who makes a repre-

resentation which he neither knows nor cares whether it is true or not can have no real belief in the truth of what he asserts and is guilty of deception: *Kountze v. Kennedy*, 147 N. Y. 124, 49 Am. St. Rep. 651. See, too, *Linscott v. Orient Ins. Co.*, 88 Me. 497, 51 Am. St. Rep. 435. When a person is in a situation to know, and it is his duty to know, whether a statement, upon the faith of which another has been induced to enter into a contract, is true or false, the law imputes such knowledge to him, and the statement, if untrue, is held to be fraudulent as to him who relies upon it: *Prewitt v. Trimble*, 92 Ky. 176, 36 Am. St. Rep. 586.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

SIMMONS v. SIMMONS.

[56 W. Va. 65, 48 S. E. 833.]

ATTACHMENT—Variance as to Cause of Action.—An inconsistency between the claim stated in the affidavit for an attachment and the demand described in the declaration, is fatal to the attachment. (p. 891.)

ATTACHMENT—Variance.—A Motion to Quash is the proper mode of reaching a variance between the affidavit for an attachment and the declaration. (p. 892.)

ATTACHMENT—Variance.—A Plea in Abatement to an attachment, which sets up only matters of variance appearing from the affidavit and declaration, may be treated as a motion to quash. (p. 893.)

ATTACHMENT—Variance.—An Order Overruling a Motion to Quash an attachment because of a variance is interlocutory and is not a bar to a second motion. (p. 894.)

Walter Pendleton, for the plaintiff in error.

Schilling & Harper, for the defendant in error.

⁶⁵ **POFFENBARGER, P.** The principal questions arising upon the record in this case are as follows: 1. Is there a variance, fatal to an attachment, when the declaration is founded upon a written contract, binding the defendant conditionally to the payment of money, and the affidavit for the attachment describes the contract as one for unconditional payment of money? 2. Should advantage of such variance be taken by motion to quash or plea in abatement? 3. Can a plea in abatement, setting up the objection, be treated as a motion to quash? 4. Does the overruling ⁶⁶ of a motion to quash an attachment preclude the quashing of it upon a renewal of the motion made before the filing of any plea in the case?

In June, 1902, T. R. Simmons commenced an action of ~~as-~~sumpsit with an attachment in the circuit court of Roane county, against Z. T. Simmons, and, at July rules, 1902, filed his declaration, containing the common counts and one special count, founded upon a contract in writing whereby the said Z. T. Simmons bound himself to pay to the plaintiff the sum of twelve hundred dollars, upon the setting aside, in a chancery suit then pending, of a certain will and a certain deed and the payment by the plaintiff of the defendant's share of the costs in said chancery suit. The last clause of the contract says "but in the event the deed and will is not set aside, but held as good, then the said Z. T. Simmons is not to pay to T. R. Simmons the said twelve hundred dollars." The attachment affidavit describes the plaintiff's claim as follows: "For the amount due upon a written agreement, dated July 21, 1900, for twelve hundred dollars, payable to the said T. R. Simmons and signed by the said Z. T. Simmons by W. S. Simmons, his attorney in fact." On the twenty-seventh day of November, 1902, the defendant, appearing specially, moved to quash the attachment on the ground of insufficiency of the affidavit, and the motion was overruled. On the next day, he tendered a plea in abatement, showing the variance of the affidavit from the declaration, and praying that the attachment be quashed. To the filing of the plea there was objection, and the court took time to consider of its judgment. On the seventh day of December, 1903, the court overruled the objection, permitted the plea and a general replication thereto to be filed, entertained a motion to quash, sustained it and quashed the attachment.

The difference between the affidavit and the declaration is very apparent. As the declaration is the basis of the main action, as to which the attachment is a mere ancillary proceeding, the claim or demand set forth in the former must be regarded as the one intended to be enforced. Since the demand set up in the affidavit differs from it, the plaintiff fails to comply with that requirement of the statute which says the affidavit shall state the nature of the plaintiff's claim. It does not state the claim shown by the declaration, but a different claim. It refers to a written contract of the same date as that set forth in the ⁶⁷ declaration, but in all other respects, the description of the instrument in the affidavit fails to accord with the contract set out in the declaration. But, as the affidavit purports to state the nature of the de-

mand, and states one entirely different from the claim described in the declaration, the result is what the courts term a variance. The two papers are inconsistent. The contract upon which recovery is sought would be admissible as evidence under the declaration, but does not accord with the statement found in the affidavit. In *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 787, Judge Brannon said: "The cause of action stated in the two papers ought to be the same." This view is fully sustained by the authorities. "A plaintiff may not attach for one cause of action, and having sustained his writ, declare for another": *Hambrick v. Wilkins*, 65 Miss. 18, 7 Am. St. Rep. 631, 3 South. 67; *Ligon v. Bishop*, 43 Miss. 527; *Focke v. Hardeman*, 67 Tex. 173, 2 S. W. 363; *Deering v. Collins*, 38 Mo. App. 80. A leading case on this subject is *Wright v. Snedecor*, 46 Ala. 92. The cases uniformly hold that a difference in substance between the declaration and affidavit is fatal, but there are many decisions holding that slight departures will not overthrow the attachment: *De Stafford v. Gartley*, 15 Colo. 31, 24 Pac. 580; *Whitlock v. Kirkwood*, 16 Ark. 488; *Evans v. Lawson*, 64 Tex. 199. If it be suggested that the affidavit is consistent with the common counts, the reply is that it contains no statement of any claim which could be proven under the common counts. It does not say the plaintiff's claim is one for work and labor, goods, wares and merchandise sold and delivered, money received to the use of the plaintiff, or any other claim of similar kind.

How shall the defendant avail himself of the defect? Can the court, on a motion to quash, consider the declaration? No reason for inability to do so is suggested. Though, for some purposes separate, the attachment grows out of, and depends upon, the main action. It is process out of the main suit, binding the property of the defendant. It cannot be obtained, except at the commencement of the principal action, or subsequent thereto, and, therefore, can have no independent existence. Summons, commencing the action, must be followed by the filing of the declaration, within a specified time, else the entire proceeding fails. It must stand upon them, and as the declaration brings into the record the true nature of the plaintiff's ⁶⁸ claim, the defect in the proceeding which quashes the attachment appears in an instrument that is vital to the extent of that writ. No discussion of this question has been found in the text-books or reports of decisions, but it has been held that an attachment may be quashed, upon

motion, for variance of the affidavit from the complaint: *Moore v. First Nat. Bank*, 82 Tex. 537, 18 S. W. 657. How could the variance have appeared except by reference to the complaint? Moreover, the usual and ordinary way of procuring the overthrow of an attachment because of defects in the proceedings is by motion, and not by plea. It is the method prescribed by the statute for taking advantage of insufficiency of any kind in the affidavit: Code, c. 106, sec. 19. A plea is not required except when it is desired to controvert the existence of the grounds for attachment set forth in the affidavit. In Alabama, a plea in abatement seems to be necessary in all cases: *Free v. Howard*, 44 Ala. 195; *Kirkman v. Patton*, 19 Ala. 32; *Horton v. Miller*, 84 Ala. 537, 4 South. 370. Such was formerly declared to be the rule in North Carolina, but it seems to have been recently decided otherwise: *Hale v. Richardson*, 89 N. C. 62. In most of the other states the procedure is by motion: 3 Ency. of Pl. & Pr. 80; *Drake on Attachment*, 112. The motion itself, though oral, is substantially a plea in abatement: 3 Ency. of Pl. & Pr. 80; *Drake on Attachment*, 112. Our conclusion is that a motion to quash is the proper mode of making objection on the ground of such variance.

As stated above, the motion to quash is virtually an oral plea in abatement. There is no reason why it might not as well be put in writing, nor would tendering it in writing change its character. What was tendered, therefore, as a plea in abatement was, in substance and effect, a motion to quash, pointing out specifically and accurately the ground of the motion. It set up nothing that did not already appear. Therefore, it performed no office as a plea. It was accompanied by a verbal motion to quash, and, upon receiving it, the court treated it as a motion, and promptly quashed the attachment. The ruling in *Stevens v. Brown*, 20 W. Va. 450, is not contrary to this position. The motion to quash, in that case, having been overruled, this court in reviewing the case, said the "affidavits, attachments and returns thereon are more formal and technically correct than is often the case in proceedings of that character." The defendant's ⁶⁹ pleas to the attachment having been also overruled, this court said they did not put in issue any matters for which the attachment should be abated, and, further, that "The defense attempted to be made by said pleas in abatement has relation to the merits of the action." They were in no sense like, or similar

to, the paper under consideration here, except in respect to name.

For the suggestion that a second motion to dissolve could not be entertained, no authority is cited. The statutory jurisdiction of the appellate court to review the action of the trial court upon such motion, section 1, chapter 135 of the Code, does not argue finality in the act of the court in overruling the motion. If any inference can be drawn from this, it is that the order is interlocutory, and, therefore, not appealable under the general statute. If it is interlocutory, the court may set it aside or modify it at any time. Like a demurrer, it denies the sufficiency in law of the process under which the defendant's property is held and of the affidavit upon which the writ is founded, and it is well settled that no appeal lies from an order overruling a demurrer, under the statute, giving appellate jurisdiction over judgments and decrees: *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285; *Buehler v. Chevront*, 15 W. Va. 479. The order overruling the first motion to quash was not *res judicata*, nor did it come too late. Though there has been no appearance in the principal action, it strengthens the view here expressed to say that, under our decisions, the right to make this motion is not lost by pleading to the merits: *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681. Here, as in many other states, the motion seems to be a plea to the jurisdiction of the court over the attached property, a matter entirely distinct from the jurisdiction of the person of the defendant. In some states, it may be made at any time before final judgment, and, in others, even after judgment: *Shinn on Attachments*, sec. 345.

For the foregoing reasons, the order complained of will be affirmed.

VARIANCES IN ATTACHMENT PROCEEDINGS.

- I. Materiality of Variance, 894.
- II. Discrepancy in Names of Parties, 895.
- III. Discrepancy in Causes of Action or Grounds for Attachment, 896.
- IV. Inconsistency as to Amount of Claim or Demand, 897.
- V. Inconsistency as to Maturity of Indebtedness, 898.
- VI. Manner of Taking Advantage of Variance, 898.

I. Materiality of Variance.

Material variances in attachment proceedings are usually regarded as fatal: *Woodley v. Shirley, Minor* (Ala.), 14. It is otherwise, however, in case of slight discrepancies. To quote from the principal

case: "The cases uniformly hold that a difference in substance between the declaration and affidavit are fatal, but there are many decisions holding that slight departures will not overthrow the attachment"; citing *Whitlock v. Kirkwood*, 16 Ark. 488; *De Stafford v. Gartley*, 15 Colo. 32, 24 Pac. 580; *Evans v. Lawson*, 64 Tex. 199. A discrepancy between the attachment and the levy as to who has possession of the property is immaterial after levy: *Cooper v. Lockett*, 65 Ga. 702. And a variance between the bond and the attachment cannot be assigned as error, when the recital in the bond is unnecessary: *Peck v. Critchlow*, 8 Miss. (7 How.) 243. In Maryland, a variance between an account filed with the original declaration under the rule-day act, and one filed with a petition for a writ of attachment, where the defendant is not summoned and no judgment by default is sought, is immaterial: *Steuart v. Chappell*, 98 Md. 527, 57 Atl. 17.

II. Discrepancy in Names of Parties.

A variance between the names, number, and identity of the parties plaintiff in an attachment and the declaration filed in the same suit, is held fatal on demurrer, but curable by amendment, in *Ligon v. Bishop*, 43 Miss. 527. And where an attachment bond and the declaration set out the plaintiff's name as Henry M., while the writ runs in the name of Hezekiah M., the writ is quashed in *Musgrave v. Brady*, *Morris* (Iowa), 456. But where the affidavit states that Ullman and Haussman are indebted, etc., while the bond recites that Ullman and H. Hausman are indebted, and the declaration declares against Henry Ullman and William H. Hausman, the discrepancies are held immaterial: *Commercial Bank v. Ullman*, 18 Miss. (10 Smedes & M.) 411.

Where writs of foreign attachment are issued against A and B jointly, but the declarations are against the defendant only, suggesting B to be A's wife, this is held fatal on special demurrer in *Lamar v. Reid*, 2 McMull. (S. C.) 346. A variance between an affidavit for an attachment by trustees of a town and the writ of attachment, in that the indebtedness is described in the affidavit to be to A, B, C, and D, trustees, and in the writ as A, B, and C, surviving trustees, is immaterial: *Clanton v. Laird*, 12 Smedes & M. 568. So, there is no variance where the affidavit in attachment recites that A B owes, while the declaration avers that A B, surviving partner, owes: *Sheffield v. Key*, 14 Ga. 537. An attachment is not vitiated by the fact that it is issued against J. H. Johnston & Co., while the affidavit describes the firm as John Henry Johnston & Co.: *Johnston v. Smith*, 83 Ga. 779, 10 S. E. 354. In an action by a partnership, where the Christian name of one member of the firm, as stated in the writ of attachment, is not the same as that stated in the petition in the cause, the variance

is held fatal in *Focke v. Hardeman*, 67 Tex. 173, 2 S. W. 363. Said the court: "That an important variance between the petition and the affidavit or writ will vitiate the latter is well established, and a variance is important when the petition is based upon a demand due to a firm composed of certain members, and the affidavit on a demand due to a firm which is not composed of the same partners: *Drake on Attachment*, sec. 36; *Wright v. Snedecor*, 46 Ala. 92."

III. Discrepancy in Causes of Action or Grounds for Attachment

A variance between the cause of action stated in the affidavit for an attachment and the cause of action described in the complaint, petition or declaration, may prove fatal to the proceedings: See the principal case, ante, p. 890; *Wright v. Snedecor*, 46 Ala. 92; *Deering v. Collins*, 38 Mo. App. 80. "We assent to the proposition advanced by the appellant," said Chief Justice Cooper in *Hambrick v. Wilkins*, 65 Miss. 18, 7 Am. St. Rep. 631, 3 South. 67, "that a plaintiff may not attach for one cause of action, and, having sustained his writ, declare for another." It has been affirmed, however, that after issue has been taken upon a declaration, the defendant cannot object to evidence under a count in the declaration which describes a different indebtedness from that mentioned in the affidavit: *Palmer v. Logan*, 4 Ill. 56. And in *Redus v. Wofford*, 12 Miss. (4 Smedes & M.) 579, it is said that upon a judgment after inquiry of damages, in an attachment suit, it is no objection to the validity of the proceedings subsequent to the judgment that the attachment is partly for unliquidated damages and the declaration is in trover, such objection being cured by the statute of jeofails.

A petition for attachment against an alleged fraudulent debtor on the ground that he has "given a fraudulent mortgage on all his real estate and stock of goods and all other property liable to" the plaintiff's demand, is not supported by an affidavit averring that the defendant "is fraudulently disposing of his property": *Simpson v. Holt*, 89 Ga. 834, 16 S. E. 87. But it seems there is no variance between the cause of action for which the attachment was sued out and that declared in the declaration, where the declaration was for breach of warranty, whereas the ground for suing out the attachment was that the warranty so broken was fraudulently made: *Hambrick v. Wilkins*, 65 Miss. 18, 7 Am. St. Rep. 631, 3 South. 67. Where the short note, which performs the office of a declaration, describes the cause of action as dated "June 1st, 1867," and the cause of action filed with the attachment is dated "June 1st, 1864," the variance is held fatal in *Browning v. Pasquay*, 35 Md. 294. And where the short note states a cause of action in assumpsit, and the writ issued is in trespass on the case, matters for which debt or covenant is the only remedy are held not recoverable in *Boarman v. Patterson*, 1 Gill

(Md.), 372. There is no variance where the affidavit alleges an indebtedness of a certain sum for the rent of land due at a specified time, and the complaint claims the same amount as due on a bond payable at the same date: *Perkerson v. Snodgrass*, 85 Ala. 137, 4 South. 752.

IV. Inconsistency as to Amount of Claim or Demand.

It is affirmed in *Hughes v. Foreman*, 78 Ill. App. 460 (citing *Plato v. Turrill*, 18 Ill. 273), that in attachment suits no advantage can be taken of a variance between the declaration and the affidavit as to the amount claimed or demanded, unless the declaration counts upon a different cause of action from that stated in the affidavit. So, in *Grotte v. Nagle*, 50 Neb. 363, 69 N. W. 973 (citing 1 Shinn on Attachment, pp. 213, 214; *Paul v. Ward*, 21 Ind. 211; *Aultman v. Daggs*, 50 Mo. App. 280; *Lathrop v. Snyder*, 16 Wis. 293), it is held that a slight variance between the amount averred in the petition and the amount set forth in the affidavit is immaterial. See, also, *Shaubhut v. Hilton*, 7 Minn. 506; *Piggott v. Schram*, 64 Tex. 447; *La Force v. Schiff-Lewin Co.* (Tex. Civ. App.), 29 S. W. 77; *Rogers v. East Line Lumber Co.*, 11 Tex. Civ. App. 108, 33 S. W. 312.

If the affidavit sets forth a demand for less than that claimed in the petition, the proceedings are not thereby vitiated: *Heard v. Lowry*, 5 Ark. 522; *Moore v. Harlan*, 37 Ga. 623; *Stewart v. Heidenheimer*, 55 Tex. 644; *Evans v. Lawson*, 64 Tex. 199; *Aultman etc. Co. v. Smyth* (Tex. Civ. App.), 43 S. W. 932. For example, where the affidavit states the indebtedness as a certain amount, whereas the petition states the same amount and interest, the attachment should not be quashed: *Smith v. Mather* (Tex. Civ. App.), 49 S. W. 257. Nor is the variance fatal where the affidavit claims the interest due on the debt, while the bond is silent as to the interest: *Whitlock v. Kirkwood*, 16 Ark. 488. But in *Joiner v. Perkins*, 59 Tex. 300, where the plaintiff prayed for a writ of attachment for one amount, but stated in his petition the amount of his claim at a different sum, and in his affidavit stated the amount of his demand at still another sum, the writ was quashed.

The writ of attachment may issue for a less amount than that claimed in the affidavit or complaint, but it should not issue for a greater amount: *Tibbet v. Sue*, 122 Cal. 206, 54 Pac. 741; *Hale v. Milliken*, 142 Cal. 134, 75 Pac. 653; *Tessier v. Crowley*, 16 Neb. 369, 20 N. W. 264; *Ballard v. Great Western Min. etc. Co.*, 39 W. Va. 394, 19 S. E. 510; *Dwyer v. Testard*, 65 Tex. 432. It has been held that where the affidavit and writ state the debt at one amount, whereas the petition states it at a less amount, the variance is fatal: *Moore v. Corley*, 4 Tex. Civ. App. 200, 16 S. W. 787.

V. Inconsistency as to Maturity of Indebtedness.

Where there is a variance between the petition and the affidavit in the description of the instrument sued on, as to the date when the debt is due and as to the time it draws interest, this is held a sufficient cause for quashing the writ in *Moore v. First Nat. Bank*, 82 Tex. 537, 18 S. W. 657. So, where the short note, which performs the functions of a declaration, describes the cause of action as of one date, whereas the cause of action filed with the attachment bears a different date, the attachment is quashed in *Browning v. Pasquay*, 35 Md. 294. In *Tessier v. Englehart*, 18 Neb. 167, 24 N. W. 734, it is decided that the fact that an examination of the petition or bill of particulars may disclose that some part of the amount stated in the affidavit is not yet due is not a fatal defect.

VI. Manner of Taking Advantage of Variance.

A variance between the affidavit for an attachment and the complaint cannot, it has been decided in some jurisdictions, be taken advantage of by demurrer to the complaint: *Odom v. Shackleford*, 44 Ala. 331; *Longyear v. Minnesota Lumber Co.*, 108 Mich. 645, 66 N. W. 567. In some of the states it has been held that variances in attachment proceedings may be reached by a plea in abatement: *Goldsticker v. Stetson*, 21 Ala. 404; *Evans v. Tucker*, 59 Tex. 249. Perhaps a motion to quash is the remedy most generally in use: See the principal case, ante, p. 890; *Moore v. First Nat. Bank*, 82 Tex. 537, 18 S. W. 657. A variance between the amount of the debt claimed in the affidavit and the amount claimed in the complaint must be taken advantage of in the trial court. The objection cannot be made for the first time on appeal: *McAbee v. Parker*, 78 Ala. 573; *Fears v. Thompson*, 82 Ala. 294, 2 South. 719.

SWIGER v. HAYMAN.

[56 W. Va. 123, 48 S. E. 839.]

CONTRACT—Breach.—The Mere Renunciation of an executory contract by one of the parties, which is retracted within a few minutes thereafter, and before any declaration has been made or act done by the other party in respect thereto, and before any change in the situation of the parties or the subject matter of the contract has taken place, does not constitute a breach of the agreement. (p. 903.)

COSTS.—In Interpleader Proceedings respecting a sum of money in the hands of the plaintiff, he is entitled to a decree for costs out of the fund, and the defendant not in fault is entitled to a decree against the other defendant for the costs so taken out of the fund, as well as for his own costs. (p. 903.)

M. G. Sperry and R. S. Douglass, for the appellant.

Davis & Davis and John Bassel, for the appellees.

¹²³ **POFFENBARGER, P.** The vital question presented here is, whether a mere renunciation of an executory contract by one of the parties thereto which is recanted or retracted within a few minutes afterward, and before any declaration has been made or act done by the other party, in respect to such renunciation, and before any change in the situation of the parties or the subject matter of the contract has taken place, constitutes a breach of the agreement.

¹²⁴ The litigation arose upon the following contract:

“This Agreement, made this 26th day of March, 1901, by and between C. E. Mark, of the first part, and Hayman & Coston, of the second part, all of the county of Harrison and State of West Virginia:

“Witnesseth:—that the said party of the first part has this day bargained and sold unto the parties of the second part all his stock of groceries and merchandise, now in the Goff Building in the city of Clarksburg, W. Va., on the following terms and conditions, that is to say,—for cash at invoice, plus twenty-five per cent. additional, and this sale is to include all fixtures and appliances used by the said party of the first part, including horse, delivery wagon and harness.

“The invoice of the stock hereby sold is to be made Thursday, March the 28th, 1901, and on the following days if necessary to complete the same.

“And the parties hereto hereby deliver into the hands of John R. Swiger, their checks for the amount of two hundred

dollars each, to be held as liquidated damages to either of the parties, in case either of the parties hereto shall retract the sale.

“(Signed) C. E. MARK. [Seal]

“(Signed) HAYMAN & COSTON. [Seal]

“By NEWELL J. HAYMAN.”

Upon the signing of this paper, the checks mentioned therein were made and deposited as therein agreed. This occurred on Tuesday, the twenty-sixth day of March, 1901, and on the second day thereafter, Thursday, the parties began listing the stock of goods. In the evening of that day, after the listing had been completed, or about so, the question of valuation came up, and the purchasers called for the invoices. They were produced on the next morning, and the work of inserting the values was taken up. Very soon thereafter, some articles which had been purchased in New York appeared on the list and Mark said ten cents must be added for drayage and an additional amount for freight. To this, Hayman & Coston objected. Thereupon they resorted to a lawyer for his advice as to the meaning of the terms, “at invoice,” as used in the contract. This did not result in an agreement, and Mark left the room. He says that, before leaving, he proposed an arbitration, and that Hayman said, “We won’t do it, we are strangers here and don’t want to get the worst of it. We ¹²⁵ will settle it by law.” Mark says he then went down stairs, and, being advised by a friend to yield, returned in a few minutes and announced his willingness to do so, but that Hayman said, “No, sir, we will settle it by law.” Hayman says Mark said, before leaving the room, “We will settle it in court. Get yourself ready”; and that, after going out, he returned in probably ten or fifteen minutes, and said he would yield the freight and drayage, and asked them to go over with him and fix it up, to which he (Hayman) replied, “No, Mr. Mark, you have broken your contract and we are not ready for any new one.” Coston’s testimony is substantially the same as that of Hayman, except that he did not hear what Mark said upon returning to the room. On March 29, 1901, the succeeding day, Mark caused a notice to be served upon Hayman & Coston, making known his readiness to carry out the contract, demanding compliance with its terms on their part, and saying he would demand possession of the checks, if they did not comply on that day. This notice they disregarded.

The next step was an action before a justice of the peace, brought by Hayman & Coston against Swiger, the stakeholder, on the same day on which Mark's notice was served upon them. Thereupon Swiger commenced, in the circuit court of Harrison county, a suit in equity, enjoining prosecutions against him, and praying that the contending claimants of the fund in his hands be required to interplead in that suit, concerning the fund in dispute. They did so, with the result that the two checks were delivered over to the clerk, collected, and a decree pronounced directing payment of the entire amount, four hundred dollars, to Hayman & Coston, and from that decree Mark has appealed.

This decree rests upon two theories: 1. That there was a repudiation by Mark of the entire contract; 2. That the mere repudiation of it, without any act done or declaration made by Hayman & Coston, or change of conditions released them. As to the first of these two propositions, it is unnecessary to say anything. The unsoundness of the second reverses the decree. The renunciation of the contract by Mark, if there was one, was retracted immediately and before the other parties had announced any purpose or intention in respect to it, and before they were in any way prejudiced by it. The supreme court of the ¹²⁶ United States in *United States v. Smoot*, 15 Wall. 36, 21 L. ed. 107, and in *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. Rep. 855, 29 L. ed. 984, has approved the following statement of the law in *Benjamin on Sales*, seventh edition, section 568, as sound: "But a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterward continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end." To the same effect is the text in *Hammon on Contracts*, section 456.

In *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286, the court announces the law as follows: "When one of the parties to an executory contract announces to the other that he will not perform, and does not before the time fixed for the performance of a condition precedent by the other withdraw his declaration, such other party is excused from performance, or an offer to perform upon his part, and may, when the day has passed for performance by the one who has so declared his

purpose, maintain an action for a breach of the contract." A case in point is *Traver v. Halstead*, 23 Wend. 66, concerning an executory contract for the sale of a farm by Halstead to Traver. Before the expiration of the time for closing the contract, Traver gave Halstead notice that he would not take and pay for the land, but afterward, on the day appointed for payment, he tendered payment, whereupon Halstead refused to convey, and the court held that there was no breach of the contract on the part of Traver. Cowen, Judge, in delivering the opinion of the court, said: "But the refusal on the 4th was not conclusive on the plaintiff. He had a right to change his mind, as he avers that he did, which is not denied by the plea, and still present himself and offer to perform on the 5th. This was equivalent to a revocation of what he had before said, which could not operate as more than a mere license or excuse to the defendant for not being ready. The refusal did not discharge the covenant; but we would not allow the plaintiff thus to play a trick on the defendant. He does not, however, say he had been thrown off his guard, and that he merely wanted time therefor. He admits, by not denying, what the plaintiff avers in his declaration that when he did come, and tender a performance, the defendant met him with a general refusal; ¹²⁷ and would not even receive the securities. Non constat that he had parted with the title, or taken any steps in consequence of the notice of the day before, so as to be prejudiced by it. If he had, then the plaintiff ought to be estopped from insisting on performance. But he recanted his refusal within the time fixed by the covenant, and the defendant still continued, for aught we hear, on the 5th and up to the time of the recantation in all respects as able to perform as he would have been had the plaintiff said nothing." Much of the doctrine relied upon by the appellees is said to have been declared in *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384, not to be sound law, or, rather, not applicable to cases of this kind, but to contracts of marriage, in which there are mutual obligations of relationship to be maintained before the time of performance of the contract, and which are sundered by mere renunciation. That case holds as follows: "An action for the breach of a written agreement to purchase land, brought before the expiration of time given for the purchase, cannot be maintained by proof of the absolute refusal on the defendant's part ever to purchase."

To the possible suggestion that here the recantation did not come before the time for performance, appointed by the contract, the reply is that, unlike a contract for the payment of money, this one cannot be instantaneously performed. To take an invoice, including the ascertainment of values, requires time, and this must have been in the contemplation of the parties. The contract is silent as to the day or hour of the completion of its execution. Nothing more than a slight interruption and delay occurred by reason of the act of Mark, complained of and relied upon as a breach. The other parties took no step whatever in consequence of his renunciation. Their situation was not changed or altered in the least, and they did not signify by word or act what their wishes or purposes were, what interpretation they put upon the language and conduct of Mark, nor what they intended to do, until after he had retracted, and then it was too late.

Under the foregoing principles, the decree in favor of Hayman & Coston must be reversed, and, as upon the whole case, it appears that they have failed to comply with their contract, Mark is entitled to his damages, according to the stipulation of the agreement, and also to the money deposited by him to answer for any default on his part. Therefore, it being the duty of this ¹²⁸ court to pronounce such a decree as the circuit court should have entered, the decree complained of will be reversed and a decree entered, directing the payment to Mark of said sum of four hundred dollars, less costs to the plaintiff up until the time of the payment of said sum into court, which are decreed to him out of the fund, and requiring the appellees, Hayman & Coston to pay to the appellant Mark his costs in the circuit court as well as his costs in this court, and also to the said Mark the costs of the plaintiff aforesaid, so as to reimburse him to the extent of the deduction from the fund in court for said purpose: 11 Ency. of Pl. & Pr. 475; Aldridge v. Mesner, 6 Ves. Jr. 418; Beers v. Spooner, 9 Leigh, 153.

Reversed.

An Action for the Breach of a Contract to purchase land brought before the expiration of the time given for the purchase, cannot, according to Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384, be maintained by proof of an absolute refusal on the defendant's part to purchase. See, however, Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509; Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208; Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516.

TURNER v. McCORMICK.

[56 W. Va. 161, 49 S. E. 28.]

CONTRACT—Acceptance.—A Request for a Change or modification of a proposed contract, made before an acceptance thereof, amounts to a rejection of it. (p. 908.)

CONTRACT—Acceptance.—A Mere Inquiry as to whether one proposing a contract will alter or modify its terms, made before acceptance or rejection, does not amount to a rejection; and, if the offer is not withdrawn before acceptance made within a reasonable time, it becomes a binding contract. (pp. 908, 916.)

CONTRACT—Acceptance.—A Request, Suggestion, or proposal of alteration or modification, made after an unconditional acceptance of an offer, and not assented to by the opposite party, does not affect the contract put in force and effect by the acceptance, nor amount to a breach thereof, giving a right of rescission. (pp. 908, 914, 916.)

OPTION.—The Acceptance of a Formal and carefully prepared option for the sale of land, within the time by it allowed, and according to its terms, although accompanied by a request for a departure from its terms as to the time and place of performance, is an unconditional acceptance, and converts the option into an executory contract of sale, provided the request is not so worded as to limit or qualify the acceptance. (pp. 914, 916.)

Moreland & Glasscock and H. L. Robinson, for the appellant.

H. M. Russell and W. S. Meredith, for the appellee.

162 **POFFENBARGER, P.** In this case, the circuit court sustained a demurrer to a bill, praying the specific performance of two alleged contracts for the sale of the Pittsburgh vein of coal underlying two separate tracts of land in Monongalia county. The owner of the land executed two options of sale to the plaintiff, each of which provided that it should be accepted within a certain time, and, if not so accepted, it should be void. The demurrer was sustained upon the theory that what is relied upon in the bill as constituting acceptance is insufficient, because it sought to introduce a new element into the proposed contract, and make, not the contract originally proposed, but a new and different contract.

The first option bears date December 31, 1901, was executed by William McCormick, as party of the first part, and E. D. Turner, as party of the second part, covers the coal in a tract of about one hundred and fifty acres at the price of fifty dollars per acre, one-third to be paid

in cash on delivery of deed and the balance in two equal annual payments, and provides, as to acceptance, that, "The party of the first part agrees that the party of the second part shall have until the first day of March, 1902, to accept the coal herein described as the same may be determined by the county surveyor. . . . And if the party of the second part does not give notice of such acceptance by said date, this contract shall be void, and of no further effect."

The other option, executed by the same parties, is dated February 8, 1902, covers the Pittsburg vein of coal in and underlying a tract containing about one hundred and four acres; at the price of forty-one dollars per acre, one-third to be paid in cash on delivery of deed and the balance in two equal annual payments, and provides as to acceptance, that, "If the second party, heirs or assigns, fails to notify said first party in writing, on or before the first day of March, 1902, that he or they elect to purchase said coal, then this agreement is to be considered as rescinded, null and void and neither party to be bound thereby or liable in any way." As to performance and the consummation of the proposed sale, the written option provided as follows: "The first party shall and will, within ninety days, after the notice in writing that the said second party, his heirs or assigns, elect to purchase said coal at his own proper cost and charge, make, execute and deliver to the said second party, his heirs or assigns a good and ¹⁰³ sufficient deed or deeds for said coal and mining rights, in fee simple, clear of all encumbrances, with clause of general warranty," etc.

The first option does not require acceptance in writing nor performance within ninety days after notice of acceptance. The second does impose these conditions. Besides alleging a verbal acceptance of both of these options on the twenty-first day of February, 1902, the bill avers an acceptance and notice thereof in writing, and sets out a copy of the notice of acceptance which reads as follows:

"Morgantown, W. Va., Feb. 21, 1902.

"Mr. William McCormick: I hereby notify you that your coal will be accepted according to terms of the option given to me on same and respectfully request you to make delivery of deed, with abstract of title, to me, in Morgan-

town, W. Va., on Saturday, June 28th, 1902, hour and place to be decided later.

“Yours truly,

“E. D. TURNER.”

Two objections to the written acceptance are urged. One of these relates to the first clause, and is that its language relates to the future and imports a promise to accept and not to notice of a completed acceptance. The other objection is that the request that the deed be made on June 28, 1902, in Morgantown at an hour and place thereafter to be decided, superadded to the alleged notice of acceptance, made it conditional and not absolute, by attempting to introduce new terms into the proposed contract. Acceptance of the first option gave the right to have immediate performance and allowed no time to the vendor in which to perform thereafter. Absolute acceptance of the second option would have included as one of the terms thereof an agreement that the vendor should have ninety days within which to tender the deed. As it required acceptance on or before the first day of March, 1902, and performance within ninety days thereafter, the request or condition in the notice that the deed be delivered on the twenty-eighth day of June, 1902, named a date more than ninety days after the first day of March, the limit for acceptance, and one more than ninety days after the notice of acceptance.

The first objection overlooks the substantial and legal meaning of the terms, and amounts to a mere criticism of the phraseology. By turning this weapon upon the appellees themselves their contention is completely overthrown. The language is not that the option will be accepted, but that the coal will be accepted ¹⁶⁴ in the future and the contract itself contemplates performance in future and after acceptance of the option. It is in the very nature of a contract that it shall be first made and then performed. Moreover, the language of the acceptance, in strictness, more nearly conforms to the language of the contract than that which it is said should have been used. The provision of the option as to notice of acceptance uses this language: “That he or they elect to purchase said coal.” It requires notice of intention and election to do a thing in the future.

Hence, it may be said, without doing any violence to the language of the option, that notice of an election to purchase according to the terms of the option should be understood and deemed to carry with it by necessary implication prior or contemporaneous acceptance of the terms of the option. Acceptance of the coal according to the terms of the option could not take place without a full accession to all the terms of the option. To this it may be added that it is not usual to refer to the instrument by its date or otherwise and merely say it is accepted or its terms agreed to. Thus, in *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249, the vendee had telegraphed as follows: "Will take the property. Meet me at Toronto, first train. Answer." Another telegram responding to another proposal was, "Will accept your proposal." No substantial distinction between these forms of acceptance was discovered. In both instances, the future tense was used. In *Barrett v. McCallister*, 33 W. Va. 738, 11 S. E. 220, there was a verbal notice in which the plaintiff told the defendant, after looking over the land, he was satisfied with it and was ready to pay the money when the deed should be made. Then a day or two afterward, he wrote a letter in which he said, "I am here at your place of business ready to take the land and pay the money whenever the deed is made." In these instances, the language, with one exception, related to performance and it never occurred to anybody to question its sufficiency on that ground. In the same case, at page 745, Judge Brannon took this view. He said: "Why talk about the execution of a deed if the land was not satisfactory? Why talk about a deed, if Barrett had not accepted the option? The fact that they so talked about a deed proves that Barrett had accepted the option and informed McCallister of it; indeed, this conversation about a deed is of itself acceptance."

But it is further urged that the reference to the future in the ¹⁶⁵ first clause, coupled with the request in the second clause bears out the theory of a promise to accept in the future and precludes the view that the writing conveys notice of a prior or contemporaneous acceptance. It has already been pointed out that the declaration of intent to take the coal in accordance with the terms of the option, presupposes and necessarily implies present or past accept-

ance of the terms. The notice does not say I will take the coal according to the terms of the option on the twenty-eighth day of June, or if you will deliver the deed on the twenty-eighth day of June. Its terms are positive. The notice is that the coal will be accepted according to the terms of the option given. This is followed by a request, not a condition, that the deed be delivered on the twenty-eighth day of June, instead of at an earlier date. To couple the two clauses in the manner suggested would be to depart from the plain common sense meaning of the notice. It would do violence also to the grammatical construction of the notice. No reason is given why the latter clause limits and qualifies the former. It is not pointed out nor even suggested that the rules of grammatical construction require it, nor that the two clauses have such logical connection. The copulative conjunction used simply makes grammatical connection of the two clauses. It does not make them mutually dependent, nor the former conditional.

Yielding the first contention for the purpose of argument, counsel for appellee say that if the first clause standing alone would amount to unconditional acceptance, converting the option into a contract, binding upon both parties, the addition of the request that delivery of the deed be made on the twenty-eighth day of June, a date more than ninety days after acceptance and after the time in which acceptance could be made, renders the notice insufficient. They say this request does not relate to performance of the contract after the making thereof as proposed, and that the insertion thereof in the written notice was an attempt to engraft upon the contract proposed conditions or terms not embodied in the original proposition; and, as the bill does not show any acceptance in writing of this new condition, the effort to change the original proposition has failed and no contract has been made. If this last clause of the deed thus qualified the first, it would work a change as to the time of payment of ¹⁰⁰ the purchase money and delivery of the deed. It would also designate a place of payment as to which the options are silent.

The bill avers, as the reason for requesting delivery on the twenty-eighth day of June, that the plaintiff had similar options upon the coal underlying several other tracts

of land in the neighborhood of those owned by the defendant, and desired to close them all on the same day, it being his purpose to obtain an aggregate of one thousand or twelve hundred acres of coal in a body. While this averment is not important, it well illustrates the fact that such a request may be added to an acceptance for a good purpose, and it does not necessarily indicate an intention to change the terms of the proposed contract. The plaintiff desired the land and was willing to take it and pay for it. He preferred to close all the options on the same day, and therefore added this request. Suppose he had on one day put the first part of the notice in writing and sent it to the defendant. That would have closed the contract undoubtedly. Then suppose on the next day he had written a request that the performance be delayed until the 28th of June. That would not have been a repudiation of the contract. It would have been a mere request for an extension of time. The defendant could not have treated the contract as broken for that reason. He could have enforced it notwithstanding this request. The mere fact that the acceptance and the request are in juxtaposition, standing in the same sentence, united by a conjunction, does not change their character or legal sense.

The contention of counsel for appellee is unsupported by authority. "If an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because of inquiries whether the offerer will change his terms, or as to future acts, or the expression of a hope, or suggestions, etc.": 9 Cyc. 269. "Plaintiff answered a proposition to lease, 'I will accept your offer to lease to you at two hundred dollars per year for three or five years as you choose.' Defendant answered, 'Make out lease for place for five years at two hundred dollars per year.' He also said in this letter that he would like to build on a cookroom, with privilege to remove it. Plaintiff recognized that a lease for five years existed. Held, these letters made a lease, and the request as to the cookroom did not attach a condition to defendant's acceptance": *Culton v. Gilchrist*, 92 Iowa, 718, 61 N. W. 384. In *Phillips v. Moor*, 71 Me. 78, the court held that an acceptance coupled with a request for a modification is ¹⁶⁷ an absolute and unconditional acceptance and closes the contract. In that case,

the subject of the contract was a lot of hay. The defendant offered nine dollars and fifty cents per ton for part of it and five dollars for the balance. The plaintiff sent him a postal card in reply saying he had hoped the defendant would pay him ten dollars for his hay of the best quality and closed by saying, "but you can take the hay at your price, and when you get it hauled in, if you can pay the ten dollars, I would like to have you do it, if the hay proves good enough for the price." The defendant, having received this card on Friday morning, made no reply, and Sunday morning the hay was burned in the barn. The court held that there was a contract and that, under the peculiar circumstances dispensing with actual delivery, which ordinarily is necessary to the passing of title, the defendant was liable for the price of the hay. In *Stevenson v. McLean*, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. 897, 28 Week. Rep. 916, the principle is well illustrated. The defendant had certain warrants for iron. He wrote to plaintiffs, asking whether they could get him an offer for them. After some correspondence, the defendant fixed a net cash price of forty shillings per ton, the offer to hold good until the following Monday. On the morning of that day at 9:42 defendant telegraphed this request: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." No answer having been received, the defendant, after receipt of this telegram and without having replied to it, sold the warrants, and at 1:25 P. M. telegraphed to the plaintiffs that he had done so. Before the sending of this telegram, the plaintiffs found a purchaser for the iron, and at 1:34 P. M., telegraphed the defendant stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs brought an action against him for nondelivery and recovered. The court held that the inquiry as to whether the plaintiff would modify the terms of their offer was not a rejection of the offer, and he not having withdrawn the offer before the sale was effected, a binding contract was effected by the acceptance of the plaintiffs upon finding the purchaser at 1 P. M., twenty-five minutes prior to the sending of defendant's telegram. The ruling in that case is a very strong adjudication against the contention of the appellee here.

The request or suggestion for modification of the offer made before its acceptance, might well have been regarded as an indication of a purpose ¹⁶⁸ not to accept. Here the acceptance precedes the request for a modification.

Among the cases relied upon as authority, sustaining the action of the court in dismissing the bill, is that of *Potts v. Whitehead*, 23 N. J. Eq. 512. The report of the case in that volume does not set out the facts fully. They are given at length in 20 N. J. Eq. (5 C. E. Green) 55. There it is shown that the offer was such that an unqualified acceptance of it would not have constituted a contract, for the offer and acceptance would have left open to further negotiation important elements of the contract. In that case the defendant signed a paper embodying an offer to sell certain land in consideration of twenty dollars per acre, five hundred dollars of the price to be paid on the execution of a deed, and the balance to be secured by a mortgage on the land with interest at six per cent. When the deferred payments of the purchase money should become due was not stated, and this paper and the alleged acceptance did not fix any time. If the latter had, it would not have been binding unless assented to by the defendant. This was one ground of the decision of the chancellor, holding that there was no contract. The alleged acceptance said, "Have twice attempted the tender of the first payment of five hundred dollars upon the agreement made between us on the 7th of December last. I will meet you, etc. . . . when I shall be ready to make tender of the money and execute the proper agreements thereupon." This acceptance did not say, as does the one under consideration here, that the plaintiff would take the property in accordance with the terms of the agreement. He said he would pay five hundred dollars upon the agreement and execute the proper agreement thereupon. There is scarcely a resemblance between the two papers. What was meant by proper agreement, the court had no means of knowing. He might have meant such agreements as were just and fair or such as the offer indicated. The paper was indefinite and ambiguous. Respecting it, the chancellor said: "It doubtless might fairly be inferred from this letter, that the complainant intended to accept the offer in some way, and expected to enter into an agreement for

the purchase of this property, at the price fixed; but he did not bind himself so to do."

Another case relied upon is *Sawyer v. Brossart*, 67 Iowa, 678, 56 Am. Rep. 371, 25 N. W. 876. In that case, the defendant, a resident of Los Angeles, California, ¹⁸⁸⁹ offered for sale, by letter, two business rooms in Iowa City, saying to the plaintiff: "You can have that building for thirty-five hundred dollars, or the two for five thousand dollars. Let me hear from you at once." The alleged acceptance was by telegram from Iowa City, saying: "Accept your offer for two buildings at five thousand dollars. Money at your order at First National Bank here." The court held that the defendant "was entitled under his offer to have the money paid to him at his place of residence and to deliver the deed there, and that, as the acceptance of plaintiff was not an acceptance of the offer as made, it did not bind B.," the plaintiff. It is to be noted here that the plaintiff did not request permission to pay the money into the bank to the defendant's credit at Iowa City, but said, in effect, that the money had been paid there to his credit. Therefore, the payment into the bank at Iowa City was made a part of the acceptance. By such payment and notice plaintiff attempted to add a new condition to the contract proposed, which was silent as to the place of payment and, therefore, in law, contemplated payment at Los Angeles. It was not an unqualified acceptance coupled with a request for permission to pay at Iowa City. *Corcoran v. White*, 117 Ill. 118, 57 Am. Rep. 858, 7 N. E. 525, does not support the position taken by the appellee. The letter purporting to be an acceptance said the party would accept the offer, provided the title was perfect. It further said: "I will call at your office Monday at 10 o'clock, at which time I can get the abstract and have it examined." The common sense of this letter was that the writer had not accepted and would not accept, if he did not find the title perfect. In *Coffin v. City of Portland*, 43 Fed. 411, relating to an attempted sale of bonds, the letter said: "We will take your . . . bonds . . . at par, you to furnish us written opinion of your city attorney as to legality of bonds, certified copy of council proceedings and ordinance, certified statement of your city debts, assessed value of your taxables, probable real value, the amount of your debt,

and your present approximate population.” After putting upon its minutes an acceptance of this proposition to purchase, the council passed a resolution rescinding what the resolution called a contract, and accepted the proposition of another person for the same bonds. The court says, in its opinion: “It is more reasonable to regard the proposition of the plaintiffs in this respect as being conditional and the acceptance of it as being upon the ¹⁷⁰ same condition. This being so, the plaintiffs, of course, have no right of action.” What is meant by this is, that there had not been in fact any proposition to buy or acceptance of such proposition. The plaintiffs were simply considering the advisability of purchasing, and, in the exercise of prudence, desired to examine all the proceedings relating to the issue before making an unqualified proposition to buy. There is nothing in that case that seems to have any bearing upon the question under consideration here.

Three cases, referred to in one of the briefs for appellee, are, in all material respects, alike. They are *Robinson v. Weller* (Ga.), 8 S. E. 447, *Northwestern Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557, and *Egger v. Nesbitt*, 122 Mo. 667, 43 Am. St. Rep. 596, 27 S. W. 385. They enunciate the proposition that an acceptance of an offer to sell land, but fixing a different place for the delivery of the deed and payment of the money than the residence of the offerer, or the place named in the offer, is not an unconditional acceptance so as to bind the seller. This is asserted by several cases: *Gilbert v. Baxter*, 71 Iowa, 327, 32 N. W. 364; *Langellier v. Schaefer*, 36 Minn. 361, 31 N. W. 690. But they are all cases arising upon loose, informal correspondence, making it necessary to look to the whole of each paper to ascertain the true meaning and intent of the parties. None of the letters relied upon as acceptances said an offer was accepted in accordance with its terms, or that the property would be taken according to the terms of the letter of proposal. In none of them was the word “request” used, after language of unequivocal and definite acceptance as in this case. In *Robinson v. Weller* (Ga.), 8 S. E. 447, the reply said: “Offer accepted; money ready; send deeds at once.” In *Northwestern Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557, the letter said: “If this is the very best offer you can make, you may prop-

erly execute the within deed," etc. In *Egger v. Nesbitt*, 122 Mo. 667, 43 Am. St. Rep. 596, 27 S. W. 385, the reply said: "I will accept your proposition, with the understanding that you will deliver to me all papers," etc. Owing to the distinctions pointed out, these precedents are not regarded as applicable or controlling in the present case.

Moreover, the reasoning in some of these cases is not entirely satisfactory. Nor does it seem to accord with principles announced in *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249. If a man says "I accept your offer," that makes a contract. It assents to all the terms of the offer. What more is necessary? There is a complete ¹⁷¹ "aggregatio mentium." The acceptance conforms to the offer in every particular. How can a mere request relating, not to the making of the contract, but to its performance, be deemed to change it? Would the acceptor be permitted to excuse himself from performance on the ground of such request? No precedent of that kind has been found. They are all cases in which the proposer, desiring to escape from the consequences of his offer, because somebody else has proposed a higher price than the first asked, seeks to repudiate the transaction and sell to the other party. Property rights are sacred and should be well guarded by the law, but when a man has deliberately made a fair contract of sale, he ought not to be permitted to avoid it on some flimsy pretext, in order to avail himself of a better bargain. Time and place of payment, when not mentioned in an accepted offer, are fixed by law, and are matters of performance, carrying out the contract, a thing wholly distinct and separate from the making of the agreement. If, contemporaneously with or subsequent to the making of the contract, either party suggest, request or propose a time, place or mode of performance different from that agreed upon, that does not of itself effect such change, nor does it cause a breach, giving right of action or rescission to the other party: *Swiger v. Hayman*, 56 W. Va. 123; ante, p. 899, 48 S. E. 839. Either can compel the other to perform the contract as made. He may ignore the suggested, requested or proposed alteration of, or deviation from, the contract, as to the performance thereof: *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249. But, if the suggested departure in performance is not accompanied by a declaration of un-

qualified and unconditional acceptance of the offer, it would be otherwise, of course. Some of the cases here referred to disclosed such acceptance and others did not. The former do not harmonize with the principles enunciated by this court, and the latter do.

As much weight is accorded to the use of the word "request" here, and some of the books say that, if a request for a modification be made, it is deemed a rejection of the proposal, a case illustrating this rule will be noticed. It is *Burmester & Co. v. Phillips Co.*, 25 Fed. 805. *Burmester & Co.* of Charleston, South Carolina, on the fourteenth day of March, 1885, wrote *Phillips & Co.*, of Fredericksburg, Virginia, as follows: "On receipt of letter [you] can ship us a cargo of 10 or 15,000 bushels choice ¹⁷² dry Rappahannock white corn, at 51 cents, free on board, freight 7 cents a bushel." *Phillips & Co.* did not have the corn, but, on the 16th of the same month, they replied that they were endeavoring to get it. On the 20th they wrote that they could get it at the price and were then endeavoring to secure a vessel to carry it at seven cents. On March 23d, *Burmester & Co.* wrote that they hoped *Phillips & Co.* would succeed in getting a vessel promptly and gave some directions about ship's papers. On the 30th, *Phillips & Co.* wrote that they hoped to succeed in getting a vessel and, if so, would observe the direction about ship's papers. On April 4th, *Phillips & Co.* notified *Burmester & Co.* by wire that they had succeeded in getting a vessel and that, as soon as she arrived at the landing, they would advise, and that they would send a letter giving particulars. To this, *Burmester & Co.* replied by letter of April 4th, that they were awaiting letter's arrival as to particulars. On April 9th, *Phillips & Co.* reported that the vessel had arrived, and would be ready to receive the cargo on the following Saturday and that they would draw for the cargo at sight without grace, etc. To this *Burmester & Co.* made no reply. On April 11th, *Phillips & Co.* telegraphed as follows: "Not hearing from you, we have resold the cargo of corn." *Burmester & Co.* telegraphed back that they had not canceled the order and would expect cargo as ordered. *Burmester & Co.* afterward sued and the court held as follows: "The letter and telegram of the 4th of April were a new proposal, and that the failure of the

Charleston house to answer before the 11th prevented the meeting of minds necessary to a contract; so that there was no contract, and defendants were at liberty to resell." In the opinion the court applied general principles, expressed as follows: "If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer, and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer." In the light of the facts in that case as above stated, the proposition is sound and applicable. Instead of accepting Burmester & Company's proposition for an immediate shipment, Phillips & Co. announced their inability to do so and made a counter proposition to obtain and ship the corn later. This was a request for a new contract, different from the one first proposed. The court held that to be a rejection ¹⁷³ of the first proposition. It being a new proposal on the part of Phillips & Co., not accepted by Burmester & Co., but treated with silence, there was no contract between the parties. There was no pretense of an acceptance of the original proposal of purchase.

This somewhat lengthy review of the authorities bearing upon the question seems to establish the following propositions: 1. A request for a change or modification of a proposed contract, made before an acceptance thereof, amounts to a rejection of it; 2. A mere inquiry as to whether the proposer will alter or modify its terms, made before acceptance or rejection, does not amount to a rejection, and if the offer be not withdrawn before acceptance made within a reasonable time, the offer becomes a binding contract; 3. A request, suggestion or proposal of alteration or modification, made after unconditional acceptance, and not assented to by the opposite party, does not affect the contract put in force and effect by the acceptance, nor amount to a breach thereof, giving right of rescission; 4. Acceptance of a formal and carefully prepared option of sale of land, within the time by it allowed, and according to its terms, although accompanied by a request for a departure from its terms as to the time and place of performance, is an unconditional acceptance, and converts the option into an executory contract of sale, provided the request be not so worded as to limit or qualify the acceptance.

The bill alleges a verbal acceptance of both options at the time of delivery of the acceptance in writing, and a verbal agreement extending the time of performance until June 28th. These allegations have provoked a good deal of argument on the subject of an extension of time of performance and alterations of written contracts by parol agreement. The conclusion above indicated renders it unnecessary to go into these questions or to examine the authorities cited as bearing upon them.

Our conclusion is that the acceptance in writing of the second proposal is unconditional and converts the proposal into a binding contract. The other option does not require the acceptance to be in writing. It was verbally accepted, and that is sufficient when the option does not require a written acceptance: *Weaver v. Burr*, 31 W. Va. 136, 8 S. E. 743, 3 L. R. A. 94; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Barrett* ¹⁷⁴ *v. McAllister*, 33 W. Va. 745, 11 S. E. 220; *Creigh v. Boggs*, 19 W. Va. 240; *Capeheart v. Hale*, 6 W. Va. 547.

For the foregoing reasons, the decree complained of is reversed, the demurrer overruled, and the cause is remanded for further proceedings.

A Conditional Acceptance of an option usually amounts to a rejection thereof: *Tilton v. Sterling Coal etc. Co.*, 28 Utah, 173, ante, p. 689. And an acceptance of an offer to sell land, but fixing a different place for the delivery of the deed and the payment of the money than the residence of the respective parties or the place named in the offer, has been held not an unconditional acceptance so as to bind the seller: *Northwestern Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557. See, too, *Egger v. Nesbitt*, 122 Mo. 667, 43 Am. St. Rep. 596; *Kennedy v. Gramling*, 33 S. C. 367, 26 Am. St. Rep. 676.

CROSTON v. MALE.

[56 W. Va. 205, 49 S. E. 136.]

PARTITION—Sale.—A Court has No Right to Decree a sale in partition proceedings, without the consent of the parties, unless it finds that a division in kind cannot conveniently be made, and that the interests of the owners will be promoted by a sale. (p. 921.)

PARTITION—Sale.—A Statute Authorizing a Court to decree a sale in partition proceedings is an innovation upon the common law, and the conditions imposed by it must be present to authorize a conversion of the property into money. (p. 921.)

PARTITION—Sale—Appeal.—An Adjudication by the trial court that the conditions are such as to call for a sale on a bill for partition is entitled to great weight on appeal; yet if it appears that land has been decreed to be sold without sufficient cause, it is the duty of the appellate court to reverse the decree. (p. 922.)

PARTITION—Allotment of Shares.—Formerly, the method of partition seems to have been to divide the land into equal parts, when the shares were equal, and then determine by lot the distribution of them. But now they may be assigned by the commissioners to avoid the risk of an unfortunate allotment; they may make a distribution upon principles of equity and justice, and in this their action is under the control of the court. (p. 924.)

PARTITION—Sale—Interests of Owners.—A sale cannot be decreed in partition merely to advance the interests of one of the owners; before ordering a sale, the court must ascertain that the interests of all will thereby be promoted. (p. 924.)

PARTITION—Sale.—One Test by Which to Determine whether the interests of all the parties in partition will be promoted by a sale is whether the aggregate value of the several parcels into which the property must be divided will, when distributed among the different owners and held in severalty, be materially less than the value of the same property when owned by one person. (pp. 924, 925.)

PARTITION—Sale, when not Warranted.—A sale in partition proceedings may be unwarranted, notwithstanding there are dower and curtesy estates in the property; and the land, because varying in quality, locality, and improvements, is not of uniform value; and, if a division in kind is made, some of the shares will be of small area. (p. 925.)

PARTITION.—The Court may Decree a Division in Kind in a partition suit, although the bill does not specifically pray for it, if the allegations are sufficient and there is a prayer for general relief. (p. 925.)

PARTITION—Appointment of Commissioners.—In partition proceedings the rights and interests of the parties should be judicially determined in advance of the appointment of commissioners and the ordering of a sale. (p. 926.)

PARTITION—Estate by Curtesy.—Where one share of an estate goes to certain heirs subject to their father's estate by the curtesy, there can be no compulsory partition among them until the expiration of the life estate. (p. 926.)

Warren B. Kittle, for the appellants.

Ira E. Robinson, for the appellee.

²⁰⁷ POFFENBARGER, P. This case presents the question, whether it was error for the court, upon the facts shown by the pleadings and the report of commissioners, appointed to make partition of certain lands, to decree a sale thereof instead of a division in kind, the plaintiff having favored such sale, while, with a single exception, the adult defendants having only life estates opposed it. One-third of the land, about two hundred and forty acres in all, belonged to one set of infants, subject to the dower of their mother, another third to another set of infants, subject to an estate therein by the curtesy belonging to their father, while the residue belonged to the plaintiff, and the whole estate was subject to dower of the widow of the decedent.

Hiram Male, being the owner of said two hundred and forty-one acres of land, unencumbered by any indebtedness, and also of considerable personal property, all in Taylor county, died, leaving surviving him his widow, Ruth Male, a son, Boyer Male, a daughter, Amanda Minor, the wife of Charles Minor, and another daughter, Martha J. Croston, the wife of Charles Croston. ²⁰⁸ Subsequently, Boyer Male died, leaving his children Rosa Bell, Eugenius, Hiram and Benjamin, and his wife, Berthena Male, surviving him. Amanda Minor also died, leaving her husband, and her children, Aldine, Sarah and Ruth surviving her. Martha J. Croston instituted this suit for partition of the land. The bill alleges that there are three tracts, one of seventy-seven acres, another of fifty-eight and one-half acres, and a third of one hundred and six and one-eighth acres. These lands are all contiguous, but form an irregular body, the average length of which is more than three times the average breadth, with a narrow place near the center. The bill does not pray a division in kind, but alleges that the land cannot be so divided conveniently, and that the interests of those entitled will be promoted by a sale of the same, and a sale thereof is accordingly asked for, and there is also a prayer for general relief.

An answer for the infant defendants by guardian ad litem was filed in the usual form. Berthena Male answered the bill, denying that the land was not susceptible of partition without injury, alleging that it could be conveniently divided, denying that the interests of the parties would be promoted by a

sale thereof, and praying a division in kind. Charles Minor filed an answer of the same kind. Thereupon the court appointed commissioners to go upon the land and make partition thereof, if it could be conveniently divided and "assign to each heir or their descendants per stirpes an equal one-third interest in said estate, quantity and quality considered, and return a plat and report of their proceedings," and, if they should find it inconvenient to make partition, report that fact to the court. Their report recommended a sale and set forth certain facts in support of the recommendation. They considered the land as lying in two tracts, one of one hundred and thirty-five and one-half acres, and the other of one hundred and six and one-eighth acres. Of the former, they said about thirty acres was rough, situated on the bank of a river, almost destitute of good timber and comparatively worthless for farming or grazing purposes; and that the residue was ordinary land worth about twenty dollars per acre, with ordinary frame buildings and other outbuildings on it, had but little good timber on it, the timber having been culled by former owners, and had grown up in ²⁰⁰ briars, broomsage and other filth; that there was scarcely any fencing on it, and that the standing timber was inaccessible to most of the farm. Concerning the other tract, they said it was situated about two miles from the village of Webster, and about the same distance from the Valley river and a railroad, that it was the home farm, and better land than the other tract and in better repair, having a good frame dwelling and outbuildings, that it had no timber except a small tract on the northeast corner, that the fencing was out of repair and the land grown up in briars and filth, and that it was worth about twenty-five dollars an acre as a whole. They further said there was a tract of bottom land in it containing about nine acres of much greater value than the hill land, and that the two tracts lie on opposite sides of a high river hill, adjoining each other near the top of the hill. Considering these facts and the interests of all the parties, the dower of the widow, the infant children, their number, the dower of the widowed daughter and curtesy of the son in law, the lack of uniformity of value by reason of locality and improvements, the commissioners thought the lands were not susceptible of partition in kind. They had therefore assigned to the widow, Ruth Male, dower in the land, twenty-five acres in the one hundred and six acre tract, including the mansion house, and twenty-nine acres and

three roods in the other tract, and recommended a sale of the lands subject to the dower thus assigned. To this report, the defendants, Charles Minor and Berthena Male excepted. Ruth Male, the widow, to whom dower had been assigned, filed an answer waiving her right to dower in the land, and agreeing to take a gross sum in lieu thereof, and thereupon the court overruled the exceptions and decreed a sale of the land, reciting, among other things, that it was "impossible to assign dower to the said Berthena Male in the one-half interest of said real estate." How she happened to be entitled to dower in such portion does not appear.

The general rule, governing the determination of the question whether a sale of land shall be made upon a bill for partition is stated in *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482, as follows: "Joint owners of land are entitled to have partition in kind, each to have his share allotted to him in severalty, unless such right be waived. A sale cannot be decreed in a partition suit ²¹⁰ unless it appears, by report of commissioner or otherwise by the record, that partition cannot be conveniently made, and also that the interests of those interested in the land or its proceeds will be promoted by a sale." In any case, such sale may be made if the parties are all adults and consent thereto. But the court has no right to decree a sale without their consent, unless it finds, first, that partition in kind cannot be conveniently made, and, second, that the interests of the parties owning the land will be promoted by a sale. These two requisites are conditions imposed by the statute, which alone confers upon a court of equity the power to make a sale at all. They are important and indispensable conditions. The statute is an innovation upon the common law, taking away from the owner the right to keep his freehold, and converting his home into money. That must not be done except in cases of imperious necessity. It is a legislative alteration of a canon of the law which forms part of the substructure of our jurisprudence. Forcible conversion of property into money is avoided wherever possible. To prevent this, the possessory writs, such as *detinue* and *replevin*, etc., for recovery of the property itself, instead of turning the injured owner away to sue for its value as damages are given, and where the property is of such nature, that the remedies of the law courts are inadequate to its recovery, equity supplies the defect by the use of its more diverse and flexible processes. Therefore, it would be at vari-

ance with fundamental and basic principles to say the legislature intended to authorize a sale instead of a division for any light or trivial cause. So sacred is the right of property that, to take it from one man and give it to another for private use, is beyond the power of the state itself, even upon payment of full compensation. The *jus publicum* alone authorizes the conversion of the citizen's property into money without his consent.

An adjudication by the trial court, that the conditions are such as to call for a sale on a bill for partition, is entitled to great weight and will not be overthrown by the appellate court, unless it can clearly see that the trial court has erred in its conclusion, for it is presumed, in the absence of anything to the contrary, that a solemn recital in a decree of a court of record and of general jurisdiction has not been entered without mature consideration and upon sufficient evidence. But if it ²¹¹ appears that by reason of inadvertence or failure, for the time being, owing to haste in disposing of a large docket, to appreciate the spirit, purpose and controlling influence of these limitations upon the power of sale, land has been decreed to be sold without sufficient cause, it is the duty of the appellate court to reverse the decree: *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482; *Clason v. Clason*, 6 Paige (N. Y.), 541.

What are the rules and principles which ought to govern the court in determining whether division in kind is inconvenient, and whether the interests of the owners will be promoted by a sale? Chancellor Walworth, in *Clason v. Clason*, 6 Paige, 541, has given this question fuller discussion than is usual in the opinions of the courts. He says: "The question is not as supposed by the master, whether it would be for the benefit of the infants to have their shares of the estate converted into money instead of remaining in land producing a less income. For if it is for their interest to sell their shares for the purpose of a better investment, it may be done afterward under the general law relative to the sale of infants' estates, and when they will not run the risk of having their interest in a large property sacrificed for want of funds to compete with their adult tenant in common at the sale. The true question to be decided by the master, under the statute, is whether the whole property, taken together, will be greatly injured or diminished in value if separated into three parts, in the hands of three different persons, according

to their several rights or interests in the whole; in other words, whether the aggregate value of the several parts, when held by different individuals in severalty, would be materially less than the whole value of the property if owned by one person. In this case, if the value of the land in different parts of the tract is nearly the same, the complainant would have a farm of about two hundred and fifty acres for his share and worth fifty thousand dollars, and each of the infant defendants would have a little more than sixty acres and worth about one-fourth of that sum. And if some portions of the land are much more valuable than others, a greater quantity of that which is least valuable might be set off for the shares of the defendants, so as to increase the size of their farms. But if a sale is to take place under a decree in partition, as the guardian ad litem has no funds to enable him to bid upon ²¹² the property for the infants, this property which is stated by the master to be worth seventy-five thousand dollars may be sacrificed for half that amount, unless the decree should contain special directions to the master not to sell it below a certain specified amount."

It will be observed that, in coming to a conclusion, he considered the quantity of land, the number of shares into which it was to be divided, the status of the parties with reference to disability and ability to protect their interests at the sale, the extent of their respective interests in the land, and the relative value of the land when divided, and the sum which might be realized by a sale of it undivided. Looking at the situation of the land and the owners in this case, it is to be noticed that the quantity is about two hundred and forty acres. One-third of this the widow is entitled to hold as her dower, leaving one hundred and sixty acres, to the immediate possession of which the heirs are entitled. Of this residue, the plaintiff is entitled to one-third, unless since the commencement of the suit some changes have been effected by purchase or otherwise. This would give her immediately more than fifty acres, assuming that the land is of equal value. In another one-third of it, over fifty acres, Charles Minor has a life estate and his children the remainder in fee. These children are dependent upon him for their support, and fifty acres of land affording him a home for himself and them may be much more valuable to them than its proceeds in money. The other third belongs to the children of the deceased son, Boyer Male, subject to the dower therein of their

mother, their natural guardian. There is no reason why the shares of these children may not be laid off together. The statute provides that two or more parties may have their shares laid off together when partition can be conveniently made in that way: Code, c. 79, sec. 2. The court has in its keeping the protection of infant parties and the power of electing for them, and should exercise it, if it be apparent that their interests require it. Upon partition, this one-third can be thrown together, giving the widow her dower, as one tract or parcel adjacent to the parts to the possession of which her children are entitled, and thus a home for the mother and children may be provided. Nothing in this record indicates that the money which may be realized from a sale of their interests will be more to their advantage than a home so ²¹³ provided. On the contrary, she, on behalf of herself and children, protests against the sale, as does Charles Minor on behalf of himself and his children. Formerly the method of partition seems to have been to divide the land into equal parts, when the shares were equal, and then determine by lot the distribution of them. But now they may be assigned by the commissioners, to avoid the risk of an unfortunate allotment. They may distribute them upon principles of equity and justice, and, of course, in this, their action is under the control of the court: *Cox v. McMullin*, 14 Gratt. 82.

Nobody insists upon a sale except the plaintiff, who is an adult, having a living husband, and better able to take care of herself than any of the other parties so far as can be ascertained from this record. If, as indicated by the last decree, Berthena Male has, in some way, acquired the title of one-half of the land, since the commencement of the suit, this circumstance only strengthens her opposition to the sale. What peculiar circumstance makes it to the interest of the plaintiff to have a sale rather than a division in kind, the court cannot know. She may have a good home elsewhere. If so, she can live upon it, and take her interest in these lands, and then convert them into money at private sale. But a sale cannot be made merely to advance her interests. Before selling, the court must ascertain that the interests of all will be promoted. One test by which this is determined is declared to be "whether the aggregate value of the several parcels into which the whole premises must be divided will, when distributed among the different parties and held in severalty, be materially less than the value

of the same property if it be owned by one person": *Clason v. Clason*, 5 Paige, 541. The commissioners do not report that a division in kind will make the aggregate value of the several parcels less than the value of the property as a whole. The court must have inferred it from the facts reported. The report shows that this land is not located in the wilds of the mountain regions, far from human habitation, but, on the contrary, that it is about two miles from the railroad and about the same distance from a village, and is improved agricultural land. It is perfectly apparent that small parcels of land, thus situated, bring better prices per acre at judicial sales than large ones. There are more people able to buy small tracts than ²¹⁴ large ones. A small tract near a railroad and village better answers the purposes of a home and affords greater aid in supplying the wants of a family than one situated far from markets, or not within easy access of them. In view of these circumstances, it seems clear that the court has erred in its conclusion with reference to the inconvenience of making partition and promotion of the interests of the parties. Though the bill does not specifically pray for it, partition may be had upon it as the allegations are sufficient and there is a prayer for general relief: *Furbee v. Furbee*, 49 W. Va. 191, 38 S. E. 411.

The interlocutory decree, appointing commissioners, makes no reference to the dower interest of the widow of the decedent, to the estate by the curtesy of the husband of the deceased daughter, nor to the dower interest of the widow of the deceased son; nor does it ascertain and fix the interests of the other parties. Under some circumstances, the failure to do these things is error when carried into the final decree, prejudicing the rights of the parties, and works a reversal of it: *Stevens v. McCormick*, 90 Va. 735, 19 S. E. 742; *Childers v. Loudin*, 51 W. Va. 559, 42 S. W. 637. In the latter case this court said: "It is the duty of the court, before decreeing a sale in a partition suit, to judicially determine the rights and interests of the cotenants in the land, and failure to do so is ordinarily reversible error." Manifestly, it is more important in the case of a sale than in that of a division in kind, for the parties interested ought to know their rights so as to be able to protect them at the sale, as in the case of

creditors interested in property about to be sold. But even where partition is to be made, it ought to be done. Freeman on Cotenancy and Partition, section 518, says the interlocutory decree, determining the interests of the parties, furnishes the basis upon which the commissioners are to proceed. Manifestly, much inconvenience and useless cost might result from proceeding without having made an adjudication as to the interests of the parties. Suppose a partition to be made upon a wrong basis, in consequence of which the commissioners would have to go back and make a new division of the land. Dower and curtesy must be set apart, and it is for the court, not the commissioners, to determine who is entitled to these estates, and in what lands and to what extent. Good practice at least requires a settlement of all these questions in advance of the appointment of commissioners.

²¹⁵ It is clear that the children of Charles Minor are not entitled to immediate possession of any part of the lands. Under the principles laid down in *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56, there can be no subdivision of this one-third among them until the expiration of their father's life estate, without his consent. It belongs to them subject to his life estate, however.

For the errors aforesaid in directing the sale, the decree complained of will be reversed and the cause remanded for further proceedings according to the principles herein announced, and, further, according to the rules and principles governing courts of equity.

Partition may be by Sale and a division of the proceeds in a proper case: *Truth Lodge v. Barton*, 119 Iowa, 230, 97 Am. St. Rep. 303; *Hazen v. Webb*, 65 Kan. 38, 93 Am. St. Rep. 276; *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190; *Corrothers v. Jolliffe*, 32 W. Va. 562, 25 Am. St. Rep. 836. Indeed, a partition by sale is a matter of right when the conditions prescribed by statute to authorize a sale are found to exist: *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929.

WILSON v. BRADEN.

[56 W. Va. 372, 49 S. E. 409.]

ON A DEMURREE to the Evidence the Court will Consider the whole evidence as though on a verdict in favor of the demurrees, and will not reverse the judgment unless the evidence is insufficient to sustain the same. (p. 928.)

DEEDS—Copy as Evidence—Seal.—A copy of a deed is admissible in evidence, although it has the word "seal" after the notary's signature to the acknowledgment instead of words to indicate it as his official seal, when the notary certifies the certificate to be under his "official seal." (p. 928.)

DEEDS.—Where an Officer in Taking an Acknowledgment signs the certificate as justice of the peace and alderman, the word "alderman" may be regarded as surplusage, the words "justice of the peace" being in accordance with law. (p. 928.)

ANCIENT DEEDS.—Recitals of Heirship and widowhood in deeds over thirty years old, under which possession has been continuously held, are presumptive evidence of the truth thereof and admissible against strangers to the title. (p. 929.)

ADVERSE POSSESSION—Continuous Occupancy.—Unless an adverse claimant of land is so in possession that he may at any time be sued as a trespasser, the statute of limitations will not run in his favor. (p. 932.)

ADVERSE POSSESSION—Essential Elements.—Adverse possession, to ripen into a prescriptive title, must be actual, open, notorious, exclusive, and continuous for the statutory period. (p. 932.)

ADVERSE POSSESSION—What does not Constitute.—The payment of taxes, assertion of title, prevention of trespasses, temporary occupancy to cut timber and till patches of land, with intervening periods of no occupancy unexplained, do not amount to adverse possession which will ripen into a prescriptive title. (p. 934.)

W. N. Miller, for the plaintiffs in error.

V. B. Archer, William Beard, S. Robinson and H. B. Woods, for the defendant in error.

374 DENT, J. Henry S. Wilson, plaintiff, obtained a writ of error from a judgment of the circuit court of Ritchie county in a suit in ejectment in favor of George Braden and Hester Deem, awarding them title to two certain tracts of land claimed by the plaintiff.

The case was here before (48 W. Va. 196, 36 S. E. 367), and a judgment for the same defendants was reversed and a new trial awarded. A new trial being had, the plaintiff having proved his title, and possession thereunder and the defendants having set up possession under color of title for more than ten years, the plaintiff demurred to

the evidence in which the defendants joined. On a conditional verdict the court found for the defendants, and gave judgment accordingly. It is now well established that on a demurrer to the evidence, the court will consider the whole evidence as though on a verdict in favor of the demurrees, and will not reverse the judgment unless the evidence is insufficient to sustain the same: *Bowman v. Dewing*, 50 W. Va. 446, 40 S. E. 576; *Lewis v. Chesapeake etc. R. R. Co.*, 47 W. Va. 656, 81 Am. St. Rep. 816, 35 S. E. 908.

The first question that arises on demurrer is as to whether the plaintiff has made his title clear, either by a complete chain from the commonwealth of Virginia or by possession under color of title for the statutory period. If he has not done one or both of these, his demurrer was properly overruled. The plaintiff traces his title back to the commonwealth of Virginia through a patent issued by the governor to William Tilton, assignee of Michael Ryan, dated August 4, 1785.

The first objection to plaintiff's title is that the copy of the deed from Charles E. Applegate and wife to Henry S. Wilson has the word "seal" after notary's signature to the acknowledgment, instead of some words to indicate it to have been his official seal. The notary certifies the certificate to be under his "official seal." The clerk in copying presumably considered the word "seal" sufficient to show that the official seal was affixed. In the case of *Miller v. Holt*, 47 W. Va. 10, 34 S. E. 956, this very objection ³⁷⁵ was considered and overruled, and rightly so. for the word "seal" must have been annexed to the notary's signature to represent his official seal, and not his private seal. The same objection is made to several of the title deeds, but it is untenable and was properly overruled.

The objection is made to the certificate of acknowledgment to the deed of Ann Kemble, widow of Robert Kemble, because the same is signed by two officers in their double capacity of alderman and justice. The Code of 1819, section 6, chapter 99, authorized the acknowledgment to be made before and certified by two justices of the peace. The word "alderman" can properly be regarded as surplusage, the words "justice of the peace" being in accordance with the law.

The next objection is to the two deeds in the chain conveying the title of Robert J. Kemble, deceased, one deed being from Ann Kemble, widow of Robert J. Kemble, dated 1843, and the other from Mary D. Summers, formerly Mary D. Kemble, wife and sole heiress of her father Robert D. Kemble, bearing date February 17, 1853, because there was no evidence other than the deeds to show that the one was the widow and the other the sole heiress to Robert J. Kemble, deceased. If these deeds were of modern origin, it would be necessary as against strangers to produce such evidence: 24 Am. & Eng. Ency. of Law, 2d ed., 60; Wiley v. Givens, 6 Gratt. 277. But such is not the law as to ancient deeds, upward of thirty years old, where possession has been continuously held thereunder: 24 Am. & Eng. Ency. of Law, 2d ed., 61; 2 Am. & Eng. Ency. of Law, 2d ed., 331; Harman v. Stearns, 95 Va. 63, 27 S. E. 601; Fulker-son v. Holmes, 117 U. S. 389, 6 Sup. Ct. Rep. 680, 29 L. ed. 915; Deery v. Gray, 5 Wall. 795, 18 L. ed. 653; Games v. Stiles, 14 Pet. 322, 10 L. ed. 476; Davis v. Pearson, 6 Tex. Civ. App. 593, 22 S. W. 241; Brown v. Simpson, 67 Tex. 225, 2 S. W. 644. This is on the theory that if the recitals were untrue, they would have long since been disproved and time and possession has raised the presumption of their truth, admissible even against strangers. Ann Kemble's deed under the circumstances could only be admitted as conveyance of her dower interest in the land, but it was good for the purpose, although it recited therein another deed not produced, which might have conveyed to her some other interest: Deery v. Gray, 5 Wall. 795, 18 L. ed. 653. Mary D. Summers' deed conveyed her interest in the land as the sole heir of her father, ³⁷⁶ Robert J. Kemble, deceased, and thereby the Kemble link in the title is made complete.

These being the only objections to plaintiff's chain of title, and they being without foundation, we must hold it good. It is strengthened by long-time actual possession of the land thereunder beginning as far back as the year 1860. If the plaintiff had only color of title by break in his chain as to the Kemble deed, still the actual possession of the property by those under whom he claims would have ripened into good title long before the Bradens set up a claim to the land awarded to them by the judgment, and also as to the Deem tract, unless Hester Deem or those

under whom she claims had such adverse possession as ousted from possession those under whom plaintiff claims. This brings us to the main issue in this case.

Both defendants found their title to the separate tracts claimed by them under color of title and adverse possession for the period of ten years. The question then presented by the demurrer to evidence is as to whether the defendants or either of them have had such adverse, open, notorious, continuous and exclusive possession of either of said tracts of land under color of title for the period of ten years prior to the institution of this suit as will divest plaintiff's title and invest it in the claimant: *Hall v. Webb*, 21 W. Va. 324; *Adkins v. Spurlöck*, 46 W. Va. 139, 33 S. E. 121; *Bicknell v. Comstock*, 113 U. S. 149, 5 Sup. Ct. Rep. 399, 28 L. ed. 962; *Dickerson v. Colegrove*, 100 U. S. 578, 25 L. ed. 618.

First, as to the George W. Braden interlock of about fifty acres. Plaintiff's predecessors had actual possession of this interlock with a portion thereof under cultivation down until the year 1879, when Ezekiel Braden after having surveyed this land, obtained the key of the house thereon from the tenant in charge, E. Bradley, and as he claimed in the former trial thereby obtained possession thereof. He afterward tore down this house and removed it off. He did not disturb the Trembly and Daley fields included in the interlock, which had been cleared, fenced and cultivated by tenants under plaintiff's title. He allowed one Noland in 1881 or 1882 to erect a cabin and cultivate a small piece of ground in a remote corner of the interlock. After Noland moved off, he allowed one Patsy Jenkins to occupy the cabin during the year 1882. Jacob Riggs testifies that he bought fifty acres of land, including the interlock of defendant Braden during the year 1883, built a house thereon ³⁷⁷ outside of the interlock, tore down the Noland cabin, which had a clearing of about three-fourths of an acre, and cleared about three acres of land on the interlock, and cultivated it. He remained in the house about eighteen months. After that time down to the present time there has been no house upon or actual occupancy of the interlock by the defendant Braden. Defendant Braden purchased the house from Riggs and took the land back. No title papers ever passed between them. In 1885 defendant Braden received a deed from his father, and moved into the Riggs

house. The holder of plaintiff's title was at this time a nonresident of the state and occupying the land by tenants. The two fields on the land known as the Daley and Trembly fields remained practically unchanged. The Daley field was in part on the interlock and the residue extended over on plaintiff's other land. Defendant Braden claims to have farmed these fields some years. The rest of the land lay open with probably the exception of a small uncertain amount down at the Patsy Jenkins corner. When plaintiff purchased and surveyed the land in 1888, he found nobody in actual possession of the interlock. He saw the old Riggs' log house which was unoccupied and was not on the interlock. He saw also the Trembly field and although he was back and forth several years, thereafter, he saw no one on the interlock and knew of no one claiming it until he was informed that defendant Braden was cutting some timber on it. He immediately served a notice on him to stop trespassing, and instituted this suit. The evidence shows that defendant Braden was claiming this land prior to plaintiff's purchase. He cultivated some portions of it at different times, and had cut some timber off of it. He never actually occupied it. He never fenced it, and never changed the fences around the Trembly or Daley fields except he attempted to make some change in the fence around the Daley field a short time prior to the institution of this suit. At the time plaintiff purchased his alleged possession had not ripened into title. The manner in which this alleged possession was maintained seemed to be such as not to furnish the owners of plaintiff's title notice thereof. The building of the Riggs house off of the land and leaving the land uninclosed and in the same condition generally as it was when originally occupied by tenants under plaintiff's title, are circumstances strongly against defendant Braden's contention. In the case of *Core v. Faupel*, 24 W. Va. 246, it ³⁷⁸ is held: "If the land is of a character to admit permanent useful improvement, the possession must be kept up during the whole statutory period by actual residence or by continued cultivation or inclosure. Surveys, cutting wood, occasional occupancy with payment of taxes will not do. Where there are several adverse possessions, they cannot be tacked together so as to effect a bar or ouster of the title of the owner, unless the several occupants claim in privity, and there

was no break in the succession of the one to the other. The possessory estates must be connected and continuous." "Unless the adverse claimant is so in possession of the land that he may at any time be sued as a trespasser, the statute will not run in his favor; and although he may have taken actual possession, if he does not continue there so that he may be sued at any time as a trespasser during the prescriptive bar, he cannot rely on the statute of limitations." "The moment the premises become vacant, that moment the owner, by reason of his legal title will be regarded in the constructive possession and the adverse possession of the wrongdoer is at an end." The plaintiff when he purchased found the premises entirely vacant and for more than five years thereafter, he never found any one in possession of the premises whom he could treat as a trespasser. Even prior to that time the possession is not shown to be continuous. The defendant did not have it inclosed, did not live on it, did not cultivate it except occasionally cropped a portion of it, and cut some timber off of it. His occupancy thereof in any manner was intermittent. No time after the plaintiff purchased had he noticed by the defendant's actual occupancy thereof in such manner that he could have brought suit against him as a trespasser until just before this suit was brought. The defendant has wholly failed to show such continuous possession of the land that the law requires. His evidence on the subject of possession is that in 1879 his father surveyed the land, got the key to the house thereon from a tenant in possession under plaintiff's title, tore down the house and moved it away. Afterward, at a time made uncertain by the evidence, being from 1879 to 1882, one Nolan built a little cabin on a remote corner of the land and lived there for about a year. After he left, Patsy Jenkins moved in the cabin. How long after is not shown. She was put off by defendant Braden after he bought the land. He says she was there about one year. After she left, no one had actual ³⁷⁹ possession of the land until Jacob W. Riggs built a house on the Braden land outside of the interlock in 1883. He says he went there in September, 1883, and left in March, 1885. He cleared about three acres on the interlock and raised a crop, including a crop of corn on the Trembly field. After he moved out of his house, how long after it is not shown, defendant Braden moved in it.

He fails to show that he took actual possession of the land when Riggs moved out, nor does he show when he moved out of the house. He says he farmed the land in 1885. There is no positive evidence of any actual occupation of the land during the years 1886, 1887 and 1888. The plaintiff purchased in 1888, and on surveying the land found no one in occupation of the interlock adversely to his tenants, and the Riggs house was vacant and in a dilapidated condition. This evidence of plaintiff is not contradicted. The years 1886, 1887 and 1888 form such a break in the continuity of defendant's possession that if it had not been continually broken before, would permit the intervention of plaintiff's possession and prevent the running of the statute. For it is not shown that there was any one in such actual adverse possession of the interlock during this period that plaintiff could have at any time sued such person as a trespasser. Defendant testifies that he thinks that in 1889 he rented the land to Lee Roberts, who lived there about one year. After that, when it is not shown, he thinks Marion Deem was there about one year. George Deem, he also thinks lived in the Riggs house. He does not know when, and that Ben Harris lived on the land at an uncertain time. After Deem he put Joshua Haught in possession of the land. Joshua Haught says he moved in the Braden house on the 26th of March, 1895, and stayed there until the 10th of March, 1897. He says he rented the improved ground, and put the Daley field and Cove fields in corn and oats. His occupancy was just before and after the suit was brought. The actual, open, notorious, visible and continuous possession of the land during the years 1892, 1893 and 1894, by Braden or his tenants is not sustained by the proof. The interlock undoubtedly during those years was in the constructive possession of the plaintiff either for all or some period of the time. "Upon every discontinuance of the possession of the wrongdoer, the possession of the rightful owner is by operation of law restored, and nothing short of an actual adverse and continuous possession for the statutory period can ³⁸⁰ destroy his right or vest title in the wrongdoer." "It is therefore absolutely necessary that the adverse occupancy shall be continuous, open, visible and exclusive in order to effect a bar of the title of the true owner": *Core v. Faupel*, 24 W. Va. 246, 247. The defendant Braden has wholly failed

to show by his evidence that he had actual, continuous, open, visible and exclusive possession of any portion of the interlock for any period of ten consecutive years such as would have enabled the plaintiff or those under whom he claims to have sued him at any time as a continual trespasser. There are many both great and small breaks left by his evidence in the continuity of his possession, while there is no break in the continuity of plaintiff's constructive or actual possession, except when interrupted by Braden's actual occupation of some portion of the interlock. It continually hung over the land, and whenever there was a break in Braden's occupation, it covered the land completely, cutting into and destroying the continuity of Braden's possession: *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255. Such being plainly the law, the court erred in not sustaining the demurrer to the evidence.

Nor is Mrs. Deem's evidence on demurrer any more satisfactory than her codefendants. Her counsel claim that the suit by plaintiff admits her adverse possession at the time of the suit. This does not necessarily follow as a conclusion of law. For such suit may be maintained against one not in possession, but who may be exercising acts of ownership on the land in dispute or claiming title thereto: Code, c. 90, sec. 5. Under plaintiff's title, constructive possession was held under the patent from 1785, until the possession became actual by occupancy about the year 1860. To destroy possession, actual or constructive under plaintiff's title and the transference of such title to her, it devolved upon the defendant Deem to prove actual occupancy of the interlock, or else the use and enjoyment thereof by acts of ownership equivalent to such actual occupation: *Taylor's Devises v. Burnsides*, 1 Gratt. 165; *Overton's Heirs v. Davisson*, 1 Gratt. 211, 42 Am. Dec. 544; *Garrett v. Ramsey*, 26 W. Va. 345. It is admitted that the land in the Deem interlock is still wild and uncultivated, and has never been in the actual occupancy of anyone. Defendant to sustain her contention proved the payment of taxes, the cutting of timber, not habitual, ³⁸¹ but at different times, the prevention of others from cutting timber, with slight notice of claim of title to agents of the superior title now dead. In *Taylor's Devises v. Burnsides*, 1 Gratt. 207, it is said that, "Payment of taxes, prohibition of trespasses,

surveys of the land, sales and conveyances of it, though they may serve to show a claim of title, are not evidence of actual possession." Even the cutting and selling of timber by the tenant himself, or by his authority, is but a transient trespass, unless habitual: *Konier v. Rankin*, 11 Gratt. 420; *Pasley v. English*, 5 Gratt. 141. And a sale of part of the land gives the vendor no possession of the residue. Nor is the fact that the superior claimant had notice of such acts sufficient to give actual possession, where such possession does not in fact exist. Negligence on the part of the superior claimant cannot make that actual possession which would not be without such negligence. Actual possession depends on the acts of the junior claimant and not on things left undone by the senior claimant. Such acts must be such as change the condition of the land from a wild to an inclosed or cultivated state, and so continuous in their nature as would enable the superior claimant to proceed against the inferior claimant as an actual trespasser at any time during the statutory period: *Core v. Faupel*, 24 W. Va. 246; *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255. Mrs. Deem has come far short of showing actual, open, notorious, visible, continuous and exclusive possession, such as is sufficient to overcome either the actual or constructive possession of plaintiff, and those under whom he claims, and while it would be a matter of pleasure to decide in favor of a poor woman fighting for her home, as against a rich railroad magnate, the law directs a contrary decision.

The judgment is reversed, the plaintiff's demurrer to the evidence is sustained, and judgment will be entered for the plaintiff on the conditional verdict of the jury.

ON REHEARING.

Before the law will take from one land owner his superior title, and confer it upon a junior claimant by virtue of adversary possession under the statute of limitations, it requires that such junior claimant establish by positive evidence, such adverse possession to have been actual, open, notorious, exclusive ³⁸² and continuous for the statutory period of ten years. No mere acts of trespass or temporary occupancy for the purposes of felling timber and cultivating patches of ground, with intervening lapses of no occupancy, unaccounted for, will satisfy such requirement of the law.

If the defendant, George W. Braden, had enjoyed such uninterrupted possession, his evidence alone should have been sufficient to have established a *prima facie* case, whereas it is wholly insufficient for this purpose. For the period of ten years that he claims to have owned and had possession of the interlock, there was no building or other house upon it. The Riggs house, which was shown to have been occupied at various times by himself and tenants, is entirely outside of the interlock, and there is not shown to have been any continuity of possession even as to this. Because it is shown to have been occupied at various times, the court is asked to infer that it was occupied all the time, although the evidence wholly fails to show any connection between the occupancy of the various alleged tenants. This is pure guesswork, and not just legal inference.

So that George W. Braden's testimony proves the weakness of his case, and clearly establishes the fact that his possession, whatever it may have been, falls far short of the just requirements of the law. He testifies that while he lived in the Riggs house, which was off the interlock, he only tried to cultivate the Trembly field within the interlock one year. "The land was too poor, and didn't bring anything." This shows plainly why nobody lived upon and cultivated the interlock continuously, and this was because the land was too poor, and would not bring anything. No doubt the house was built purposely off of the interlock to prevent its being included therein, and yet the main part of the defendant Braden's evidence, and the reliance of his counsel relate to the possession of this house, and not to actual occupancy of any portion of the interlock. The plaintiff, who is not contradicted, testifies that he purchased the land in 1888, had it surveyed the following spring. That would be in 1889, and in a year or two afterward had it surveyed by John Cain, that there was no house on the land, but that there was an old house off of it a considerable distance. "There is an old log house there at this time, but there is nobody occupying it. It ³⁸³ is in a dilapidated condition." This undoubtedly refers to the time when he was at and saw the house, although it may have included the time of the trial of the suit. He further says that he saw nobody occupying or farming the land at any of the various times he was on or over

it, and knew nothing about defendant's claim of trespassing until shortly before the institution of this suit. It seems to me that the evidence clearly shows that George W. Braden had some notion at one time of claiming the land, but having robbed it of its timber, and found it too poor to raise anything, he abandoned it as not worth the trouble, but after it was about to be developed for oil by the plaintiff, he began again trespassing upon it for the purpose of renewing his claim thereto. The same may be said as to the Hester Deem tract. The proof of neither of the claimants is of that strong, unbroken character that will justify the law in divesting plaintiff of his title to the land in controversy and vesting it in the defendants. If defendants' evidence had been sufficient, the labors of counsel would have been greatly simplified. Good argument cannot strengthen defective evidence. The former opinion is adhered to fully and confirmed.

Ancient Deeds as Evidence are considered in the note to Davidson v. Morrison, 9 Am. St. Rep. 302-304, and the subsequent cases of Geer v. Missouri Lumber etc. Co., 134 Mo. 85, 56 Am. St. Rep. 489; Frost v. Wolf, 77 Tex. 455, 19 Am. St. Rep. 761. A recital of possession in a certain person in an ancient certificate of survey by a public officer is evidence that he was in possession: Casey v. Inloes, 1 Gill, 430, 39 Am. Dec. 658.

The Essentials of an Adverse Possession of land which will ripen into a prescriptive title are discussed in the monographic note to De Frieze v. Quint, 28 Am. St. Rep. 158-162. Generally speaking, the possession must be open, notorious, exclusive, and hostile: See Stiff v. Cobb, 126 Ala. 381, 85 Am. St. Rep. 38; Faull v. Cooke, 19 Or. 455, 20 South. 836; Smeberg v. Cunningham, 96 Mich. 378, 35 Am. St. Rep. 613. The occupancy, however, need be only such as the land is adapted to under the circumstances of the particular case: Illinois Steel Co. v. Bilot, 109 Wis. 418, 83 Am. St. Rep. 905; Clithero v. Fenner, 122 Wis. 356, 106 Am. St. Rep. 978, and cases cited in the cross-reference note thereto.

LIPSCOMB v. CONDON.

[56 W. Va. 416, 49 S. E. 392.]

CORPORATE STOCK—Whether Subject to Execution.—Shares of stock in a corporation are not subject to execution at the common law, but they are under the statutes of West Virginia. (p. 939.)

CORPORATE STOCK—Nature of Property in.—Shares of stock in a corporation, although incorporeal in their nature, are personal property. (p. 940.)

CORPORATE STOCK—Subjecting by Creditor—Corporation as Garnishee.—In a proceeding by a creditor of a stockholder to subject his shares to the payment of his debt, the corporation may be made the garnishee. (p. 940.)

CORPORATE STOCK.—A Certificate of Stock is authentic evidence of the title to stock, but it is not the stock itself, nor is it necessary to the existence of the stock. (pp. 940, 941.)

CORPORATE STOCK—Transfer Without a Certificate.—A share of stock may be assigned without a stock certificate. (p. 941.)

CORPORATE STOCK—Informal Assignment.—A transfer of corporate stock for which no certificate has been issued may be evidenced by an informal written instrument delivered to the transferee. (p. 943.)

ATTACHMENT—Rights Obtained by Creditor.—In the absence of fraud and statutory regulations, an attaching creditor obtains only such rights in the property as the debtor has at the time of the seizure. (p. 947.)

CORPORATE STOCK—Stock Certificates.—Under the statutes of West Virginia a certificate of stock need not be issued to a shareholder unless he demands it. He may transfer his shares without having a certificate, but if he accepts one he is placed under certain restrictions as to the mode of transfer. (p. 954.)

CORPORATE RECORDS—Whether Public.—The books and records which the laws of West Virginia require private corporations to keep are not public records. (p. 955.)

CORPORATE BOOKS—For Whose Protection Intended.—The statutes of West Virginia requiring corporations to keep transfer-books in which the shares shall be assigned, are intended for the convenience and protection of the corporation and its shareholders. (p. 956.)

CORPORATE STOCK—Mode of Transfer.—If the statutes prescribe no mode for the sale of stock when no certificate has been issued, the owner may dispose of his shares in such manner as would pass his title to any other chose in action or intangible property. (p. 958.)

CORPORATE STOCK—Unregistered Transfer—Attachment.—A bona fide transfer of stock for which no certificate has been issued, though not registered on the books of the corporation, vests in the transferee a title superior to the claim of a subsequent attaching creditor of the transferrer. (p. 958.)

EQUITY PRACTICE—Attachment—Jury Trial.—When, under section 23 of chapter 106 of the Code of West Virginia, a petition is

filed in a suit in equity founded upon an attachment, setting up title by purchase, and fraud in the alleged purchase is relied upon to defeat the claim of title so set up, the trial of the issue must be upon the petition without other pleadings, and by a jury unless waived. (p. 961.)

JURY TRIAL.—A Waiver of the Right to Trial by Jury must be by consent of the parties entered of record, which is the manner prescribed by the legislature. (pp. 966, 967.)

W. B. Maxwell and Daily & Bowers, for the appellants.

F. M. Reynolds and J. P. Scott, for the appellee.

418 **POFFENBARGER, P.** This is a suit in equity against a nonresident defendant to subject to the payment of a debt, amounting to five thousand dollars and interest, by process of attachment and garnishment, certain shares of stock in a corporation which, the bill alleges, are the property of the defendant. The case presents a number of questions which seem never to have been passed upon by this court.

In the absence of any statute upon the subject, shares of stock in a corporation are not subject to execution: Cook on Corporations, sec. 480; Clark on Corporations, 1147. By that law, intangible property incapable of manual seizure and delivery cannot be taken on execution. Attachment, being a purely statutory remedy, reaches only such property as is made subject to it by the statute. Hence, if the statutes, governing the remedy by attachment, **419** do not make shares liable under it, it is clear that they cannot be subjected to the payment of debts by such proceeding: Drake on Attachments, sec. 244; Haley v. Reid, 16 Ga. 437; Foster v. Potter, 37 Mo. 525; Howe v. Starkweather, 17 Mass. 240.

By section 20 of chapter 53 of the Code of 1899, it is declared that such shares shall be deemed personal estate. Section 9 of chapter 106 gives the plaintiff in an attachment proceeding a lien, from the time of the levying of his attachment, or serving a copy thereof, as provided in that chapter, "upon the personal property, choses in action, and other securities of the defendant against whom the claim is, in the hands of or due from any garnishee, on whom it is so served." By these provisions, the legislature has expressly made choses in action liable to garnishment, and shares of corporate stock are almost universally held by the courts to be property of that nature: Thomp-

son on Corporations, secs. 1070, 2587, 4571; Cook on Corporations, sec. 123; Clark on Corporations, sec. 377. If there were no adjudications upon the subject, there would be no reason to hesitate in saying that shares of stock are subject to attachment, under these statutes. Although this court has not construed them, similar statutes have been passed upon in many of the states. In *Chesapeake etc. R. Co. v. Payne*, 29 Gratt. 502, shares in a railroad company were held liable under a statute which made the attachment a lien upon all the "estate" of the debtor. In delivering the opinion of the court, Moncure, president, said such shares were plainly within the letter, as well as the spirit, of the law. In *Union Nat. Bank v. Byram*, 131 Ill. 92, 22 N. E. 842, it was held that the words "rights and effects" of the debtor in the general attachment law were broad enough to cover shares of stock. In *Curtis v. Steever*, 36 N. J. L. 304, the words "rights and credits" in the general attachment law were sufficient. It is now well settled by the authorities that, in the absence of any statutory provision to the contrary, shares of stock, although incorporeal in their nature, are personal property: Clark on Corporations, 1142, 1143. As our statute makes them personal property and subjects apparently all forms of property to the process of attachment, by giving a lien on the real estate, personal property and choses in action and other securities of the debtor, it would be very difficult to find a plausible technical ground upon which to except them, and utterly impossible to say, in view of the vast amount of money and property ⁴²⁰ represented by corporation stock and the extent of its use for purposes of credit, that the legislature did not intend that it should be subject to the attachment laws.

Nor can there be any doubt that, in the matter of procedure, the corporation itself may be made the garnishee. Whatever interest the shareholder has, is in the custody and control of the corporation. A share of the capital stock of a corporation is the interest or right which the owner has in the management of the corporation, in its surplus profits, and, upon dissolution, in all of its assets remaining after the payment of its debts: Clark on Corporations, 1141. The certificate of stock representing the share of the owner may be in the hands of some person other than the debtor

or the corporation, but the certificate is not the share itself. For most purposes, it is not regarded as property, but only as evidence of the existence and ownership of the shares named and described in it: 10 Cyc. 588. Where the proceeding to subject stock by attachment is under the general attachment laws, the corporation is made the garnishee: *Chesapeake etc. R. Co. v. Payne*, 20 Gratt. 502. Special statutes usually make the corporation the garnishee: *Drake on Attachments*, sec. 259.

In this case, the stock, against which the proceeding is, stands on the books of the company in the name of the debtor, but is claimed by a third party under an alleged purchase thereof from the debtor, made long before the order of attachment was served upon the company, in fact, years before this suit was brought. Is the lien of the attachment superior to the title of the purchaser? The assignment of the shares was not made by delivery of share certificates, but by a mere written assignment of the shareholder to the purchaser, specifying the number of shares. It does not appear that any certificate had ever been issued, nor that any demand for the transfer of the stock from the seller to the buyer on the books of the company had ever been made. The circuit court found and held that, for the purposes of this suit, the stock was the property of the debtor, and decreed it to be sold, but, whether it did so upon the ground that the sale was fraudulent, or that an unregistered transfer of the stock is not good as against an attaching creditor, does not appear.

“The decided weight of authority holds that he who purchases for a valuable consideration a certificate of stock is protected ⁴²¹ in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books, thereby allowing his transferrer to appear to be the owner of the stock upon which the attachment or execution is levied”: *Cook on Corporations*, sec. 487. This author says it is so held in New York, Pennsylvania, New Jersey, Michigan, Minnesota, Missouri, Delaware, Nebraska, Tennessee, Kentucky, Louisiana, Mississippi, Texas and Washington, independently of any statute on the subject. In a large number of states,

the purchaser in such case is protected by statute. In still other states, a purchaser does not acquire any right to the stock as against an attaching creditor of the debtor, unless it is transferred to him on the books of the company before levied upon. The difference in the decisions is attributable, for the most part, to the peculiar terms of the statutes of the several states, bearing upon the question, and to differences in construction or like and similar statutes by the courts of different states. Where there is no statute expressly or impliedly forbidding a sale of stock without registration, it is generally, if not universally, held that the purchaser takes the legal title without a transfer of the stock on the books. Even in those jurisdictions in which the statute declares that the stock shall be transferable only on the books of the corporation, it is held that an unregistered transfer or assignment gives the purchaser a perfect equitable title as between him and the assignor, and any person claiming under the latter. The reasoning of the court in *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571, on this subject seems to be in perfect consonance with the rules and principles upon which contracts and rights of property stand. The court said, in part: "It seems too clear for argument that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law; and if that be so, the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them. This kind of property, being an intangible right, somewhat akin to the right to receive money due upon a bond or other chose in action, is incapable of actual manual delivery. All the seller can do, that corresponds at all ⁴²² to the delivery of personal chattels in other cases of sale, is, to hand over to the buyer his certificate, with a sufficient assignment by deed or otherwise, to entitle him to a transfer of the shares on the books of the company. When the seller has done this, his power and duty in the matter are ended, and it is at the option of the purchaser whether the transfer shall be recorded or not. If the purchaser omits to have the record made, he can claim no rights as a member of the corporation; and he also incurs the further risk of having his title defeated by a subsequent attachment or sale to a bona fide pur-

chaser. It is difficult to see any substantial difference between the position of this plaintiff after the sale and assignment of the shares to him by the owner and before a transfer was made on the books, and that of the grantee in a deed of land before his deed is recorded. In both cases the seller has parted with his title, and, as to him, the buyer has acquired it. It is only third persons in either case whose rights or interests are affected by the omission. In the case of an unrecorded deed, the grantor continues to be clothed with evidence of ownership after the conveyance, very similar to that which remains with the seller of shares before the transfer has been entered on the books. The record shows that he is still the owner of the land, when in fact he is not; and, so far as any interest a creditor can have in the matter is concerned, the same is precisely true in the case of shares in a corporation sold but not transferred on the books. The statutes which we hold require the transfer of shares to be entered on the books of the corporation kept for that purpose are certainly no more explicit and absolute than that which requires the recording of deeds. The object of the law, so far as creditors are concerned, is the same in both cases. As between the parties the title passes by contract and not by the record in both cases alike."

It is to be observed that the New Hampshire court holds that the statute making the stock transferable only on the books of the company is in the nature of a registration law for the benefit of purchasers and creditors, in consequence of which an unregistered purchase is not good against a subsequent attachment, but it does hold that, as between the parties, the equitable title passes, notwithstanding the statute. Many of the courts hold that, under such a statute, the legal title passes as between the parties,⁴²³ while only an equitable title passes as against the corporation and bona fide purchasers: Clark on Corporations, 1785. "In those states in which an unregistered transfer conveys the legal title to the shares, and not merely an equitable title, an unregistered transfer will necessarily convey a good title as against subsequent attaching or execution creditors of the transferrer, whether the latter has notice of the transfer before his levy or not, unless the circumstances are such as to estop the transferee to set

up his title, or the transfer is fraudulent as against the creditors of the transferrer. In those jurisdictions in which it is held that the legal title remains in the transferrer, the courts have not agreed as to the effect of an unregistered transfer as against an attaching or execution creditor of the transferrer": Clark on Corporations, 1794. If a transfer on the books of a corporation is not required by the charter or by-laws, nor by any general law, it is not necessary to give a transferee a perfect title. In such a case, a transfer by delivery of the certificate of stock duly assigned, although not registered on the books of the corporation, will prevail in all jurisdictions over a subsequent attachment by a creditor of the transferrer, whether he had notice of the transfer or not. And the same is true where registration of transfers is required by statute, not for all purposes, nor for the protection of creditors, but merely for the protection of the corporation and its creditors. "It requires a clear provision of the charter itself, or of some statute," said the Massachusetts court, "to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules, the delivering of a stock certificate, with a written transfer of the same to a bona fide purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor": Clark on Corporations, 1798, citing *Boston Music Hall Assn. v. Cory*, 129 Mass. 435. In the earlier Massachusetts cases, the contrary of this doctrine had been held, and since the decision of the case just referred to, the legislature of that state has passed a statute conforming to the principles announced therein.

In *Continental Bank v. Elliott Nat. Bank*, 7 Fed. 369, holding that an unrecorded transfer of national bank stock will take precedence of a subsequent attachment in behalf of a creditor without notice, Lowell, Judge, delivering the opinion, discusses the question most lucidly and exhaustively, reviewing ⁴²⁴ many of the authorities, both American and English. In speaking of the statutes concerning transfers of the shares upon the books of the company, he says: "No doubt it is sometime intended as a record of persons liable for the debts of the company, and is so in the case of national banks; but the great weight of authority is that it is not intended for the benefit of creditors

of the individual shareholder. Some of the courts hold that the unrecorded transfer passes only an equitable title; others, that it gives a legal title. I assume that by the decisions in the courts of the United States only an equitable title is acquired. That point is unimportant." Again he says, at page 371: "It is a general rule that creditors, whether they proceed by an attachment on mesne process, seizure on execution, creditor's bill, or through an assignee in bankruptcy, must take their debtor's property subject to all equitable as well as legal charges, liens, or opposing titles. Willis, J., in giving judgment in the queen's bench in 1868, in a case quite analogous to this, against the right of seizing shares of the apparent owner, said that it was a rule applied by that court more than a hundred years before, in the analogous case of the statutory execution under the bankrupt law, that the creditors can have no more than a debtor was entitled to in equity or at law: *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235, 37 L. J. C. P. 118, 17 L. T. 650, 16 Week. Rep. 458. It has been the law of the lord mayor's court in London, from the time of Richard I, that an equitable assignment of a chose in action should prevail against an attachment: *Westoby v. Day*, 2 El. & B. 605, 22 L. J. Q. B. 418, 18 Jur. 10, 1 Week. Rep. 431. This application of the rule obtains in Massachusetts, and in the United States generally, though a few courts hold otherwise." It is proper to say here that it is the rule in this state: *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37, 58, 23 S. E. 702; *Wall v. Norfolk etc. R. R. Co.*, 52 W. Va. 485, 492, 94 Am. St. Rep. 948, 44 S. E. 294, 64 L. R. A. 501; *Baltimore etc. R. R. Co. v. McCullough*, 12 Gratt. 595.

Except in those cases in which a statute is held to have inhibited any transfer except on the books of the company, the delivery of the certificate with an assignment to the transferee passes either a legal or an equitable title to the shares, but in this case no certificates appear to have been issued, and there was no delivery of any certificate between the parties. The only evidence of the assignment is a written instrument not under seal purporting to make over, transfer and assign, for a valuable consideration, the shares therein described. Is this sufficient to pass ⁴²⁵ any title? The shares exist independently of any certificate.

They are a species of incorporeal property. "A share certificate is merely the paper representative of an incorporeal right and stands on a footing similar to that of other muniments of title. It is not in itself property, but is merely the symbol or paper evidence of property; hence, the proprietary right may exist without a certificate": 10 Cyc. 588. "This legal relation and proprietary interest, on which it is based, are quite independent of the certificate of ownership, which is a mere evidence of title. The complete fact of title may very well exist without it": Mr. Justice Matthews, in *Cecil Nat. Bank v. Watson*, 105 U. S. 217, 222, 26 L. ed. 1039. "Millions of dollars of capital stock are held without any certificate; or, if certificates are made out, without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock: *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S. E. 90. It certifies to a fact which exists independently of itself. And an actual subscription is not necessary. There may be a virtual subscription, deducible from the acts and conduct of the party": Mr. Justice Bradley, in *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 234, 11 Sup. Ct. Rep. 984, 35 L. ed. 702. Other cases to the same effect are, *First Nat. Bank v. Gifford*, 47 Iowa, 575; *Brigham v. Mead*, 10 Allen (Mass.), 245; *Curtis v. Crossley*, 59 N. J. Eq. 358, 361, 49 Atl. 905; *Agricultural Bank v. Burr*, 11 Me. 256; *Rio Grande Cattle Co. v. Burns, Walker & Co.*, 82 Tex. 50, 56, 17 S. W. 1043.

A share of stock being an incorporeal right, incapable of manual delivery, and the certificate being nothing more than evidence of its existence and of title to the share in the holder, it is obvious it may be assigned without a certificate and in the mode adopted by the defendant here and his transferee, but for this there is authority. "Subscription rights in a proposed corporation need not be evidenced by written instrument in any particular form, but may be established by parol. A subscription right in a proposed corporation is assignable by parol, and ownership passes immediately on consummation of the sale, and by force thereof, and not by operation of law": *Manchester St. Ry. Co. v. Williams*, 71 N. H. 312, 52 Atl. 461. A certificate of stock is important for many purposes, but not

for the purpose of a transfer as between parties: *Manchester St. Ry. Co. v. Williams*, 71 N. H. 312, 52 Atl. 464; *Brigham v. Mead*, 10 Allen, 245; *Field v. Pierce*, 102 Mass. 253, 261; ⁴²⁶ *Rio Grande Cattle Co. v. Burns, Walker & Co.*, 82 Tex. 56, 17 S. W. 1043; *Baker v. Wasson*, 53 Tex. 150; *Agricultural Bank v. Burr*, 24 Me. 256, 267; *Curtis v. Crossley*, 59 N. J. Eq. 358, 361, 45 Atl. 905.

As, by the assignment or transfer from the debtor to his transferee, evidenced by the informal written instrument executed and delivered by the former to the latter, title to the stock, legal or equitable, passed, what is the status of that title as against the attaching creditor, assuming that it is only the equitable title? In addition to the authorities already noted as maintaining its superiority to the attachment lien, the following is quoted from that latest and invaluable work, *Cyclopedia of Law and Procedure*, volume 4, page 632: "The right of a creditor to property attached must be determined by the state of the title at the time the attachment was made, and in the absence of fraud and statutory regulations, he only obtains the rights which the debtor had in the property at the time, for the creditor is not in the position of a bona fide purchaser." The rule applies where the debtor holds title to property subject to a valid outstanding charge or lien, whether the lien arises by agreement of parties, by operation of law or a prior garnishment: 4 *Cyclopedia of Law and Procedure*, p. 633. The only exception to the rule, independent of statute, is that of the participation of the adverse claimant in the fraudulent purpose of the debtor, in which connection it is to be noted that, in the case of a sale of personal property, retention of possession by the seller is strong evidence of fraud, when the sale obstructs the rights of a creditor: 4 *Cyclopedia of Law and Procedure*, p. 635. It makes the sale prima facie fraudulent: *Davis v. Turner*, 4 Gratt. 422; *Forkner v. Stuart*, 6 Gratt. 197; *Dance v. Seaman*, 11 Gratt. 778; *Baltimore etc. R. R. Co. v. Glenn*, 28 Md. 287, 324, 92 Am. Dec. 688. What effect this rule of evidence is to have is an inquiry which more properly arises on the question of the validity of the sale, to be disposed of in a subsequent portion of this opinion.

As a rule those courts which hold an unregistered transfer not good, as against the creditors of the transferrer,

do not put it upon the ground that the presence of the shares on the books of the corporation in the name of the transferrer, after the sale, is tantamount to the retention of the possession of tangible personal property after sale, and is, therefore, evidence of fraud. The supreme court of New Hampshire, in *Pinkerton v. Manchester etc. R. R. Co.*, 42 N. H. 424, and in *Scripture v. Soapstone* ⁴²⁷ Co., 50 N. H. 571, puts it partially upon that ground. In the former case, the court said that the legislature had made plain its intention that the entry upon the stock record should be the appropriate indication of ownership, as it had made provision in regard to returns of stock by the clerks or treasurers for the purposes of taxation, private liability and attachment, and, in the case of manufacturing corporations, had ordained by express provision that a transfer of stock should avail nothing against an attachment until entered upon the corporation records. Whether, in the absence of such statute, the court would have arrived at the same conclusion nobody can tell, but there is no reason to assume that it would. In 1887, the legislature of that state made an unregistered transfer good against an attachment: Laws 1887, c. 16. In Connecticut, the original idea was that no title, either legal or equitable, could pass by a transfer unless recorded on the books of the corporation: *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Northrop v. Norton etc. Turnpike Co.*, 3 Conn. 544; *Northrop v. Curtis*, 5 Conn. 246; *Oxford Turnpike Co. v. Bunnel*, 6 Conn. 552. This position, however, was abandoned in *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161, propounding the quaere, whether by an unregistered transfer, an equitable title passed, and holding that, if so, it was not good against an attaching creditor, unless the transferee did all he could to have the transfer made before the attachment was levied. The statutes of Connecticut seem not to have been so rigid in their requirements in respect to the registration of stock as those of New Hampshire. The court, in the case last cited, after referring to the rule that possession of tangible property is an indication of ownership, says: "So in respect to the assignment of ordinary choses in action, there must be notice of an assignment to the debtor—the assignment conveying but an equitable interest in the thing, and notice to a trus-

tee being in equity the ordinary and only practicable mode in which an assignee can protect his interest. And in the case of the purchase of stock in a corporation, there must be such a transfer of it as the legislature in the charter or by statute prescribes; and notice of the assignment of choses in action, and the transfer required by statute of corporate stock, stand in lieu of the taking and retaining of the possession of personal chattels sold, being the only possession the nature of the property admits of." ⁴²⁸ As to choses in action, this is good law when applied to the case of a subsequent purchaser for value and without notice. But is it good law as to a creditor whose rights rise no higher than that of his debtor? That it is not considered sound even in Connecticut is evidenced by later decisions of that court. In *Mowry v. Hawkins*, 57 Conn. 453, the court said: "In the absence of fraud, stock may stand in the name of one which belongs to another, without being liable to attachment for the debts of the nominal owner. This must be so as to all creditors who have not been misled or deceived by it, and as to those who are advised as to the true state of the title." This proposition was referred to in *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102, as established Connecticut law. In *New York Commercial Co. v. Francis*, 83 Fed. 769, 28 C. C. A. 199, the proposition is applied as sound Connecticut law, the court saying in its opinion: "It is one which we are satisfied is in accordance with the general rule, and with the principles of justice, unless the equitable owner is prevented by an estoppel from showing the truth, or there has been some illegality or violation of a statutory requirement." In Alabama, an unregistered transfer is not good against an attachment, because the statute expressly declares that the holder of stocks in corporations must have the same transferred on the books of the company within fifteen days, else the same shall be void as to bona fide creditors and subsequent purchasers without notice. In Arkansas, the statute gives precedence to the attachment unless a certificate of transfer is filed with the county clerk. In California, Colorado and New Mexico, the statute declares that no transfer of stock shall be valid for any purpose whatever until entered on the corporate books. In Indiana, the attachment

prevails because the statute declares that stock shall be transferable on the corporate books and not otherwise. In Iowa, the statute says transfers shall not be valid except as between the parties until a registry is had on the corporate books: See Cook on Corporations, sec. 49, note 5. In Vermont, the statutes were much like those of New Hampshire, when *Cheever v. Meyer*, 52 Vt. 66, was decided, and the decision was rested wholly upon statutory grounds, treating the statutes as a registration law for the protection of creditors and subsequent purchasers without notice. The early cases in Massachusetts, giving precedence to the attachment, ⁴²⁰ rested upon the same ground. In *Fisher v. Essex Bank*, 5 Gray, 373, holding that shares in a bank whose charter provides that they shall "be transferable only at the banking house and on its books," cannot be transferred in any other way so as to give the transferee a good title against a creditor of the vendor who attaches them without notice of the transfer, the decision was based wholly upon the statute. As before stated, this rule has been overturned in that state by a statute. Before the passage of the statute, the court, in *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 316, in construing the United States statute concerning national banks, which did not say the stock was transferable only on the books of the bank, although the by-laws of the corporation did say so, held that an unregistered transfer must prevail over an attachment in favor of a creditor of the transferrer.

The proposition asserted in *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161, the soundness of which has been hereinbefore questioned, is the doctrine asserted in *Dearle v. Hall*, 3 Russ. 1, 2 L. J. (O. S.) Ch. 62, 27 R. R. 1, and confirmed in *Foster v. Cockrell*, 3 Clark & F. 46, 9 Bligh, N. S., 332, to the effect that of two innocent purchasers of a merely equitable interest, he shall be preferred who first gives notice to the trustee or holder of the legal title. The Connecticut court seems to have treated a creditor as standing on the same footing as a purchaser for value without notice. The fallacy and unsoundness of it is clearly shown in the opinion in *Continental Bank v. Elliott Nat. Bank*, 7 Fed. 369, 375. Lowell, J., said: "1. Though the corporation is for some purposes a trustee for the shareholders, the latter have an independent legal property in their shares

which they can convey, and whether their actual conveyance is legal or equitable is of no consequence; 2. The doctrine applies in England only to purchasers, and not to creditors seizing or attaching, even though a statute gives a right to seize all shares standing in the debtor's name in his own right. This statute was once held by the queen's bench to mean that the creditor might seize what the register showed to be apparently the property of the debtor (*Watts v. Porter*, 3 El. & B. 743, 2 C. L. R. 1553, 23 L. J. Q. B. 345, 1 Jur., N. S., 133); but this has been overruled, on the ground that the legislature cannot be supposed to have intended to take one man's property for another man's debt, without the most explicit statement of such a purpose; and therefore the 'right' ⁴³⁰ refers to the equitable as well as legal right: *Dunster v. Lord Glengall*, 3 Ir. Ch. 47; *Scott v. Lord Hastings*, 4 Kay & J. 633, 5 Jur., N. S., 450, 6 Week. Rep. 862; *Beaven v. Earl of Oxford*, 6 De Gex, M. & G. 507, 25 L. J. Ch. 299, 2 Jur., N. S., 121, 4 Week. Rep. 275; *Eyre v. McDowell*, 9 H. L. 619; *Robinson v. Nesbitt*, L. R. 3 C. P. 264, 37 L. J. C. P. 124, 17 L. T. 653, 16 Week. Rep. 543; *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235, 37 L. J. C. P. 118, 17 L. T. 650, 16 Week. Rep. 458; *Gill v. Continental Gas Co.*, L. R. 7 Ex. 332, 41 L. J. Ex. 176, 27 L. T. 428, 21 Week. Rep. 111. A few courts in this country have carried the doctrine of *Dearle v. Hall* so far as to uphold the garnishment of a non-negotiable debt which had been equitably assigned without notice. We have already seen that this is not the law in England nor in Massachusetts. Neither is it the law of the United States generally: *Drake on Attachments*, c. 24; *Cornick v. Rickards*, 3 Lea, 1. The supreme court of Tennessee in that case refused to extend the rule to shares of stock, though it applies in that state to choses in action. As shares are not chosen in action, and as attaching creditors are not purchasers, *Dearle v. Hall* is not in point."

We have a statute on this subject, and it does not extend the principle so as to protect creditors. Assignees of choses in action are required to "allow all just discounts, not only against themselves, but against the assignors, before the defendant had notice of the assign-

ment": Code, c. 100, sec. 1. Discounts are not the debts of the assignor or assignee.

Another statute gives the right to any person to set up, against an attachment, any interest in, or lien upon, the property attached which he may have without regard to notice: Code, c. 106, sec. 23; *First Nat. Bank v. Harkness*, 42 W. Va. 156, 24 S. E. 548, 33 L. R. A. 69; *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753.

This inquiry as to the grounds upon which some of the courts give precedence to an attachment over an unregistered transfer results in the conclusion that they put it upon the statutes, either authorizing or requiring transfer to be made on the books of the corporation, some of them adopting the view that, as there can be no visible change of the possession of a share, the legislature intended the record to take the place of visible possession, by way of analogy to the common-law rule relating to tangible property, and others adopting the view that the statutory provision is in the nature of a registration law for the protection of the public. It has been shown that where the former theory was adopted, it has either been abandoned⁴⁸¹ or displaced by statutes. Moreover, there never was any basis for the assumption of legislative intent to require recorded evidence of ownership of shares, when the statute did not make the record a public one. It might as well be assumed that some record ought to show who owns other choses in action, evidenced by notes, bonds and other obligations. The latter has been almost universally condemned as imputing to the legislature an intent not warranted by the language of the statute or the nature of its subject matter. Of it, Thompson on Corporations, section 2411, says: "But this view, which makes the stock and transfer books public records, open to the inspection of the public, is plainly untenable unless the statute law (as it does in some states) obliges the corporation to expose such records to the inspection of the public. Otherwise they are strictly private records, sustaining no analogy to the records of transfers of title required to be made and kept in public recording offices; and even these last records import no notice except in those cases where the statute law expressly so provides."

Our statute, viewed in the light of the foregoing authorities and principles, affords no ground for a conclusion that

an attachment in favor of a creditor of a transferrer will prevail over the title, be it legal or equitable, of a transferee, when the transfer is not entered upon the transfer book of the corporation. It does not say the stock shall be transferable only on the books of the corporation. It is silent as to what shall constitute a transfer. The provisions relating to transfer are found in sections 21, 22, 35, 36, 37 and 38 of chapter 53. The last-mentioned section has no important bearing upon this question, and the others read as follows:

“21. A transfer book shall be kept by the corporation in which the shares shall be assigned under such regulations, if there be any, as may have been prescribed by the by-laws.

“22. No share shall be transferred without the consent of the board of directors, until the same is fully paid up, or security given to the satisfaction of the board for the residue remaining unpaid. And where bond and security have been given to the corporation for any sum remaining unpaid upon stock, no transfer shall affect the validity of such bond and security.”

~~432~~ “35. The board of directors shall cause to be issued, if demanded, to any person appearing on the books of the corporation to be the owner of any shares of its stock, a certificate therefor, under the corporate seal to be signed by the president and such other officer, if any, as the board may direct, which certificate shall show the amount paid on each share.

“36. A stockholder to whom such certificate has been issued shall not be allowed to transfer the shares therein mentioned, or any part thereof, without delivering up the said certificate to the corporation to be canceled, unless the same be lost or destroyed, or sufficient cause be shown to the satisfaction of the board of directors why it cannot be produced.

“37. If any person, for valuable consideration, sell, pledge, or otherwise dispose of any shares belonging to him to another, and deliver to him the certificate for such shares, with a power of attorney authorizing the transfer of the same on the books of the corporation, the title of the former shall vest in the latter so far as may be necessary to effect the sale, pledge or other disposal of the said shares, not only as against the creditors of, and subsequent purchasers

from the former, but subject nevertheless to the provisions contained in the nineteenth section of this chapter."

It is to be observed that no certificates of stock are required to be issued unless demanded by some person appearing on the books of the corporation to be the owner of the shares. While a certificate, when issued, is generally deemed by the courts to be a muniment of title, our legislature, not deeming it essential to the existence of the shares, nor expedient on the ground of public policy, has failed to require corporations to issue them, unless demanded. The demand may be made by any person appearing on the books of the corporation to be the owner of the shares. He is an owner before he acquires a certificate. The certificate is clearly only evidence of title which exists without it and independently of it. He may exercise his own pleasure about taking a certificate. If he does accept one, however, then he is placed under restrictions as to the mode of transfer imposed by section 36, and his transferee is given special protection by section 37. These two sections will be further discussed later on. They clearly do not inhibit a transfer without a certificate, for they only relate to stockholders who have taken certificates and ⁴³³ a stockholder is not bound to take a certificate in order to complete his title. They clearly do not cover the whole subject of transfer. Section 22 imposes no conditions upon the exercise of the right to transfer, except that, if a share is not fully paid up, no transfer of it shall be made without the consent of the board of directors, unless security for the residue remaining unpaid, satisfactory to the board, be given. If the board of directors consent, it may be transferred, although not paid up nor any security given. If it is paid up, consent of the board of directors is not necessary, and the owner of it may sell it at his pleasure.

Section 21 requires the corporation to keep a transfer book "in which the shares shall be assigned under such regulations, if there be any, as may have been prescribed by the by-laws." This, no doubt, means that the names of the shareholders, together with the number of shares owned by them respectively, shall be recorded in the book kept for that purpose, but it does not mean that the entry in that book shall be necessary to pass the title. It does not say so and nothing but a strained construction

of it could make it mean that. Nowhere in our corporation laws does it appear that any of the records required to be kept are in any sense public records. Section 43 of chapter 53 requires a list of the stockholders, showing the number of shares and votes to which each is entitled to be hung up in the most public room at the principal office or place of business of the corporation, for one month before every annual meeting of the stockholders. Section 47 of the same chapter declares that the funds, books, correspondence and papers of the corporation shall be at all times subject to the inspection of the board of directors or a committee thereof, appointed for the purpose, or of any committee appointed for the purpose by a general meeting of the stockholders. No provision appears to give to the individual stockholder, much less a creditor of his, a creditor of the corporation, or a wholly disinterested person, the right of inspection at all times, or at any time. The board of directors is required by section 46 of chapter 53 to make a report to the stockholders at the annual meeting, showing the condition of the corporation, and then declares that "the board shall furnish to each stockholder requiring it, a true copy of such report, together with a list of the stockholders and their places ⁴³⁴ of residence." By section 47 of chapter 53, every stockholder has a limited right of inspection. It is only for thirty days before the annual meeting of stockholders, and extends, not to the "property and funds, books, correspondence and papers of the corporation," but only to "the minutes of the resolutions and proceedings" of the board of directors.

Not a word appears in any of the provisions just discussed from which it can reasonably be inferred that they were intended by the legislature to vest in the general public, as creditors or otherwise, any rights by which the transfer of shares is in any way impeded or restricted. But when sections 35, 36 and 37 of chapter 53 apply, it may be different. Whether Condon ever took any certificates for the shares in question does not appear. As he could hold the shares and transfer them without certificates, the court cannot assume that he held them otherwise. However, as the construction of these sections may be deemed to have some bearing upon the question now under consideration, certain purposes which they seem to

have been intended to serve will be mentioned. Judge Holt, speaking for this court, in *Donnally v. Herndon*, 41 W. Va. 519, 26 S. E. 646, after quoting sections 19 and 37 of chapter 53, said: "The manifest purpose of the statute is to permit the corporation to go by its books, in ascertaining who is the owner of the stock, and not require it to go on the street and hunt them up. . . . Evidently one of the objects of our statute cited above was to free banks and other corporations from the danger of such loose and unreliable evidence of notice of ownership of stock, by authorizing them, in their multitudinous details of affairs, to go by their books, in determining the ownership of stock, in paying dividends, so long as they are acting in good faith and with reasonable care."

Sections 36 and 37 do not apply unless a certificate has been issued. That certificate is evidence against the corporation of the existence of the share and its ownership. As long as it is out of the possession of the corporation, it is a continuing affirmation by the corporation of the title and interest of the person to whom it is issued: 10 Cyc. 590. A transfer made on the books of the corporation of the shares represented by the outstanding certificate might operate as a fraud upon the rights of an innocent purchaser of the stock. They are assignable and are sometimes said to be quasi negotiable instruments, though ⁴³⁵ they are not really negotiable in the true sense of the term: 10 Cyc. 590. Nor are they generally held to be securities in the legal sense of the term (10 Cyc. 590), but they are largely so used, and our statute, section 37, makes them evidence of complete title as between the parties to the sale and of a valid pledge when they are so used. To allow a transfer on the books of the company, inconsistent with the rights evidenced by the outstanding certificate, would produce confusion and open the door to fraud. To this extent the legislature may have intended to protect the public against fraudulent transfers on the books when certificates are outstanding; but the corporation and all its stockholders, whether holding certificates for their shares or not, have a deep interest in the subject. "The corporation has a dangerous duty to perform when stock has been attached or sold under levy of execution, and a registry is requested by the purchaser at

such sale or by a purchaser of the outstanding certificate of stock: Cook on Corporations, sec. 489.

Whether intended for the protection of the public as well as the corporation, or not, it seems clear that section 36 inhibits only a transfer upon the books of the corporation without a surrender of the certificate, and does not further restrict the power of the owner of the shares over them. It compels the officers to keep the record of shares consistent with the outstanding certificates of shares, so that neither the corporation, holders of stock nor purchasers of shares can be prejudiced or endangered by any evidence of title made by the corporation itself.

The holder of a certificate being thus protected from any injurious action at the office of the company, his transferee of that certificate, whether purchaser or pledgee, is also protected both from the acts of the corporation by said section 36, and also from the acts of the transferrer, and all persons claiming under him, whether as purchasers or creditors, by the provisions of section 37, declaring that if any person sell, pledge, or otherwise dispose of any shares belonging to him to another, and deliver to him the certificate for such shares, with a power of attorney authorizing the transfer of the same on the books of the corporation, the title of the former shall vest in the latter so far as may be necessary to effect the sale, pledge or other disposal of said shares, not only as between the parties themselves, ⁴³⁶ but also as against the creditors of, and subsequent purchasers from, the former. Is there a word in the three sections by which any intent to confer any new rights upon the creditor of a stockholder is manifested? Because section 37 says the delivery of the certificate, together with a power of attorney shall effect a complete sale or pledge as between the parties and as to subsequent purchasers from, and creditors of, the transferrer, does it follow that, without such delivery, the transferee, under a purchase for value and without fraud, would not have a title superior to the claim of a creditor of the transferrer under a subsequent attachment or execution, or of a subsequent purchaser who has not himself acquired the certificate? Suppose the certificate is lost or destroyed or not within reach when the owner of the shares represented by it wishes to pledge or sell them, and the purchaser or pledgee is willing to part with his money on the

faith of a simple instrument of writing, purporting to assign the shares, can this not be done, subject to the rights of any third party who may obtain the certificate? Not a word in the statute asserts the contrary. Is it to be implied? Restrictions upon the right to make contracts are not often so established. The statute only declares what shall be the effect of making a transfer in a particular manner, leaving the parties to be governed by the general principles of law and equity, if they make it in any other way. If the transfer be made in the manner indicated, the transferee need show nothing but the certificate and power of attorney to establish a perfect title as against everybody but the corporation. Without the certificate and power of attorney he would be required to show when, under what circumstances, and for what sum of money or other valuable consideration, he became the owner. It is obvious that, unless section 36, or some other provision of the statute, is to be regarded as a registration law for the protection of the public, who have no access to the books of the company, these sections are intended only to protect the corporation and those who claim under the certificates of stock. That neither section 36 nor any other section of chapter 53 is a public registration statute is made plain by what has been said in former parts of this opinion. That being true, the mode of sale mentioned in section 37 relates only to the matter of registering the transfer on the books of the corporation, for its ⁴³⁷ protection and that of holders of the certificate. These observations on sections 35, 36 and 37 of chapter 53 are only made for the purpose of showing that nothing in them conflicts with the conclusion reached respecting the status of an unregistered transfer, under our statutes, when no certificate is involved, and are not to be taken as constituting a binding judicial construction of the provisions of said sections. Shares of corporation stock can only exist by virtue of a statute. Our statute, as shown, makes them property and vests the subscribers with title before any certificate is issued, and does not require one to be issued. Owning the share without a certificate, he may sell it without one, or with one, at his election. The sale in this case was of stock for which no certificate had been issued. The *jus disponendi* is an incident of ownership (10 Cyc. 577), and it may be exercised in any way not

prohibited by the law. As our statute does not prescribe any mode of sale when no certificate has been issued, the owner may dispose of his share in such manner as would suffice to pass his title to any other chose in action or intangible property. The delivery of a written instrument assigning the property is clearly a symbolic delivery, if any delivery is necessary in such case.

An account for merchandise, for labor, for materials, for rent or for any other chose in action, not evidenced by writing or acknowledgment of the debtor, may be assigned by a writing such as was signed and delivered in this case, purporting to assign the shares in question. Why is it not sufficient in this case? There can be no substantial, nor even a plausible technical reason, as has been shown by authorities as well as by the provisions of the statute, making possible the existence of this kind of property.

In *Fisher v. Essex Bank*, 5 Gray (Mass.), 373, holding that the statutory mode of transfer was exclusive, the statute having said shares were transferable only on the books of the bank and at the banking house, the court said: "Before any method was established by positive law, how, by what mode, or by what precise and definite act, such property should be considered as ceasing to be the property of the seller and becoming the property of the purchaser, courts of justice might well resort to the common-law modes of transferring similar incorporeal interests, and hold that a delivery of the only muniment of title ⁴³⁸ held by the owner, with the execution and delivery of an assignment of his interest, by indorsement on the certificate or otherwise, should by analogy be held to be a valid transfer, and, when notified to the bank, should be considered as having taken effect at the date of such delivery."

As before demonstrated, the notice is only required as against subsequent purchasers.

Having no doubt about the sufficiency of the transfer to vest title in the transferee, nor as to the superiority of that title, equitable though it may be, over the attachment lien, if acquired for value and without fraud, nothing remains to be determined but the question whether the purchase was for value and in good faith.

At a sale under a decree made by the circuit court of the United States for the district of West Virginia, in May, 1890, Levi Z. Condon became the purchaser of sixty-

six thousand acres, or more, of wild lands, situate in Randolph and other counties, which sale was confirmed July 1, 1890. On the twentieth day of December, 1894, it appearing to the court that Condon had theretofore paid into the registry of the court the balance of purchase money, and had by deeds dated March 25, 1892, and April 1, 1892, conveyed to the Condon Lane Boom and Lumber Company, a corporation, the said lands, it was ordered that the same be conveyed to said company, and it was accordingly done. At about the time of Condon's conveyance to the Condon Lane Boom and Lumber Company, or shortly before that time, he owned a mill on Dry Fork river, at Bretz, some miles below the timber lands, and was trying to devise some way of getting the timber down to that point, and desired to sell the hemlock bark on the lands, and with the proceeds construct, or aid in constructing, a railroad up said river to these lands. H. Stowell says Condon employed him in June, 1892, to find a purchaser for the bark, agreeing to pay him five thousand dollars for his services upon the consummation of the sale, and that afterward, in February, 1894, a sale of the bark to the United States Leather Company, at the price of sixty-five thousand dollars, was effected as a result of his services in exploring the land, estimating the value of the bark, and furnishing information to the purchaser. The sale was made in February, 1894, and Stowell assigned his claim for the five thousand dollars to P. Lipscomb, who, in December, 1898, proceeded against Condon in equity, as a nonresident, serving the order ⁴³⁹ of attachment on the Condon Lane Boom and Lumber Company as garnishee, and that company answered, admitting that according to its books Condon was the apparent owner of thirteen hundred shares of common stock and twelve hundred and fifty shares of its preferred stock.

Later Albert N. Horner filed his petition, claiming to have purchased and paid for all of said stock long before the service of the order of attachment, and to have owned it at the time of said service, and still to be the owner of it. Jeff Lipscomb, administrator of P. Lipscomb, in whose name the suit was revived, said P. Lipscomb having died after instituting the suit, filed an answer denying that there had been any valid purchase of the stock by Horner, and charging that no valuable consideration passed

from him for the stock; that the same was placed in the hands of Horner by Condon "for the sole and express purpose of hindering, delaying and defrauding the said plaintiff" out of the collection of said debt, as well as other creditors. He was informed and believed that no assignment or transfer of the stock had been made until after the sending out of the attachment, and that then Condon and Horner conceived and executed a plan to defeat the collection of the debt, by transferring the stock after the service of the writ and dating the transfer back, "in order to give the said pretended transfer a semblance of having been done for a valuable consideration." All of which said transaction was intended to hinder, delay and defraud the creditors of the said Condon and especially "this plaintiff."

As no replication to this answer was filed and no depositions were taken on the subject matter thereof after it was filed, it is insisted, upon the authority of *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670, *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804, and *Findley v. Smith*, 6 Munf. 134, that the allegations of fraud, on the part of Horner, contained in the answer to his petition, must be taken as true. Counsel for appellant, Horner, deny the correctness of this position, saying that no answer was required. For this they rely upon the language of section 23 of chapter 106 of the code, under which the petition is filed. This section, after authorizing the filing of the petition, says: "The court without any other pleading, shall impanel a jury to inquire into such claim."

Though originally there might have been difference of opinion ⁴⁴⁰ as to the application of this statute to suits in equity with attachment, the question seems to have been settled in favor of it. In *Chapman v. Pittsburg etc. R. Co.*, 26 W. Va. 324, the court seems to have approved the ruling in *Anderson v. Johnson*, 32 Gratt. 558. That was a suit in equity founded upon an attachment and the court held as follows: "Where persons claiming the property attached, or some interest in it, are admitted as parties in the cause, their claim is to be tried by a jury impaneled for the purpose, as provided by the statute, Code of 1873, chapter 148, section 25; and it is error for the court to pass upon the claims without the intervention of the jury." *Chapman v. Pittsburg etc. R. Co.*, 26 W. Va. 324, was also a suit in equity with an attachment and Judge Johnson,

in discussing it in view of said section of the statute, said: "If the petition shows a prima facie right in the petitioner to the property in the petition, a title better than that of the defendant, then the court should impanel a jury to inquire into the claim."

Although the inquiry now is not as to the right to a trial by jury, but as to what pleadings are necessary in a case of this kind, the two decisions just referred to and others apply the statute in question to all attachment suits whether in equity or at law. There can be no doubt of its applicability in actions at law, and these cases foreclose any question as to the intent of the legislature to apply it to suits in equity.

That it is competent for the legislature to require jury trials in equity proceedings cannot be doubted. In many instances it has authorized and required courts of equity to direct issues out of chancery to the law side of the court for the determination of questions of fact proper for ascertainment by a jury. The statute governing attachment proceedings requires a trial by jury of the issue made on a plea in abatement, denying the existence of the ground upon which the attachment is sued out. Whether the proceedings are entered in the chancery order book or the law order book of the same court is more a matter of form than substance, though it is sometimes error not to enter it in the latter: *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413. In section 23, providing for intervention by third parties, the legislature may have intended a direction of an issue and trial by jury in all cases, whether the title set up was legal or equitable in its nature. But, if it were an open question, it might well be doubted whether the legislature did so intend, and whether it was intended, ⁴⁴¹ when the proceeding is in equity, to alter the rules of pleading, and limit the pleadings to the petition alone.

The statutory provision in question appears for the first time in the Code of 1849. The object of the amendment is stated by the revisers in their report, page 761, as follows: "This section, as altered from the present law, will close the question, whether a suit in equity is not necessary when a party claims under a subsequent attachment." Up to that time the statute had made no provision for any third party, who desired to dispute the validity of the

plaintiff's attachment or who desired to assert a lien on the attached property under any other attachment or otherwise. The provision was as follows: "Whenever the goods and chattels, taken by virtue of any attachment, shall be claimed by any person, other than such debtor, the court shall immediately (unless good cause be shown by either party for a continuance) direct a jury to be impaneled to inquire into the right of property": Code 1819, c. 123, sec. 16. That chapter relates to both foreign attachments in equity and attachments at law, but the distinction between the two kinds of proceeding seems to be very clearly marked and said section 16 seems to be applicable to the latter only. The doubt and uncertainty alluded to by the revisers is exemplified in *Erskine v. Staley*, 12 Leigh, 406, and *Moore v. Holt*, 10 Gratt. 284. Both of these cases arose before the amendment of the attachment statute adverted to, and their nature is indicated by point 1 of the syllabus in *Moore v. Holt*, 10 Gratt. 284, which reads as follows: "Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands; and afterward other creditors sue out attachments at law against the same party as an absconding debtor, which are served upon the same garnishee; and before the foreign attachment is ready for a hearing, they obtain judgments and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the same." In that case the court very clearly points out the difference between foreign attachment in equity, as it existed in Virginia at that time, and the statutory attachment in equity and at law which now obtains in Virginia and this state. In foreign attachment the process with an indorsement on it in the nature of ⁴⁴² an attachment created a lien, although no affidavit at all had been filed; but, to authorize the officer to take the effects out of the hands of the garnishee, or require him to give security to have the same forthcoming, an affidavit was necessary. For the amount and nature of the claim reference was had to the bill. The bill and process with the indorsement gave a lien. Hence, the title was drawn into the main suit. The bill asked for subjection of the property to satisfaction of the debt, and brought it within the jurisdiction of the court. In an action at law, the property came into the case by reason of

the levy of the attachment only. All this suggests the quaere whether the legislative object was not merely to enable a lienholder by execution or otherwise, and the person claiming an equitable title to the attached property in a proceeding at law, to assert his claim in a court of law, a thing which he could not do, or to do which his right before the amendment was doubtful, and not to work any change whatever in the rules governing the pleadings, when the suit in which the attachment is sued out is in equity. It is to be observed that Judge Moncure's discussion of the subject in *Anderson v. Johnson*, 32 Gratt. 558, is limited to a single paragraph of about a half dozen lines and makes no reference whatever to the history of the subject or reason of the amendment. Nor does Judge Johnson enter upon any examination of it. Moreover, I see no good reason why it may not here be held that the parties, by going into equity, have waived the right to a trial at law, since fraud, the real core of the controversy, is always a matter of equity cognizance. Though not free from doubt as to the proper construction of the section, I yield to the views of the other members of the court who are satisfied with the interpretation which the Virginia court has given the statute and which this court has approved as already stated.

Under a misapprehension of the law, superinduced by the action of the parties, the court treated the petition of Horner as a cross-bill, and heard the matters in difference between him and the attaching creditor upon it and the answer thereto and upon the depositions taken and filed by the parties. In bringing the case on to be heard, the decree contains the usual recitals, except that it refers to the agreement between the parties, upon which also it was heard. This is an agreement entered into between Horner and the plaintiff, authorizing the filing of Horner's ⁴⁴³ petition with the clerk of the court in vacation, and the answer of the plaintiff to the petition within forty days from the date of the agreement, and providing that thereafter the parties might go on "and take their proof upon said petition just as if the same had been filed in court and mature the same for hearing, but either party shall have a right to object to any pleading, or proof just as if the same were filed in court." In an effort to be more explicit the parties repeated the agreement in the follow-

ing terms: "All legal objections which either party may have to any pleading, or evidence, are reserved for the consideration of the court and the hearing of said petition shall be had just as though the same and the bond of the plaintiff and the answer of the plaintiff had been tendered in open court for the action of the court, and it is further agreed that the parties may take such legal and proper proof upon legal notice as they have a right to take."

Assuming either that the statute did not contemplate a trial at law of the matters in difference between the petitioner and the plaintiff, or that, if it did, they might elect to try according to the rules of equity procedure, depositions were taken and filed and the court disposed of the case as one in equity. Considered as a trial at law by the court in lieu of a jury, how does the case stand? No witnesses were produced and examined to prove the contention of either party. No ground is shown for the use of depositions instead of oral testimony of witnesses. Had objection been made, the depositions could not properly have been used, and there was no evidence before the court. However, counsel for appellant now insists that the action of the court shall be treated as a trial at law and the depositions to prove his petition as having been properly admitted. The court, erroneously treating the proceeding as governed by the rules of equity practice, regarded the allegations of fraud in the answer as true and entered a decree for the plaintiff. This operated a complete surprise upon the petitioner. To permit him now to turn the proceeding into one at law, and give him the benefit of his depositions, would work an equally great surprise upon the plaintiff. Hence, it is plain that, under a misconception of the nature of the proceeding, there has been a mistrial, operating injustice to both parties. The plaintiff has had no opportunity ⁴⁴⁴ to interpose objections to the introduction of petitioner's evidence irregularly taken and introduced. The petitioner has been unwittingly drawn into a trap which denies him the benefit of his evidence on merely technical grounds. The principle announced in *Echols v. Tracewell*, 52 W. Va. 614, 44 S. E. 164, and in *Armstrong v. Town of Grafton*, 23 W. Va. 50, is well adapted to situations of this kind, and its application will enable the parties to have a fair trial under proper rulings

by the court. On the theory of a misconception of the case by both counsel and the court, in consequence of which there had been no fair trial, the appellate court reversed the decrees in those two cases and remanded them. Viewed from this point of observation, the vice of the proceeding is the adoption of a wrong mode of trial and the application to the trial of improper rules of procedure.

That the case was heard on the agreement does not relieve from the effect of this irregularity. The parties reserved the right to make all proper objections to the pleadings and evidence, and under the rules governing the mode of trial adopted, no objections would have been entertained. Hence, it was useless to make any. We cannot assume that the appellee would have relied upon the want of a replication, or failed to object to the introduction of depositions, without grounds therefor having been shown, had he been informed that the trial was at law instead of in equity. He agreed that proof might be taken under the apprehension that the proceeding was governed by the rules of equity pleading and practice. This is manifest from the terms of the agreement. Therefore, he cannot be said to have consented to the use of the depositions on a trial at law, and, in fact, as well as in law, the record shows there never was any such trial.

The position of counsel for appellant is open to another serious objection. The record does not show any express waiver of a jury by the appellee. The decision is in his favor. Appellant would reverse the decree and then have the court render against the appellee a new decree, such as, in the opinion of counsel for appellant, the court below should have entered. While an adjudication in favor of the appellee, without the waiver of a jury, might stand, because he cannot be prejudiced thereby, one against him might be fatally erroneous for want of such waiver. In decreeing against him this court is bound to ⁴⁴⁵ notice and protect his rights. That a jury may be waived is beyond doubt, but the legislature has seen fit to prescribe the manner in which such waiver shall be shown, namely, by consent of the parties or their counsel entered of record: Code, c. 116, sec. 29. This statute was put in the Code of 1849 upon the recommendation of the revisers, at a time when the constitutional guaranty of jury trial

was in a form different from that in which it now appears, but the alteration in its language makes it no less sacred, and our law-makers have not exercised their discretion to dispense with the statutory requirement as to the manner in which such waiver shall be evidenced. Through all the mutations of our organic and other laws, they have suffered the statute to remain wholly unaltered, and its provisions have been uniformly observed down to the present time, so far as the reported decisions of this court disclose. For more than half a century the statute has stood, working no inconvenience, and yet effectually guarding this most important and sacred right of the citizen against inadvertent and inconsiderate waiver. In view of all this, it would be clearly contrary to legislative intent, and a violent innovation upon our settled practice, to permit any form of waiver different from that prescribed by the statute. None of our decisions seem to countenance any authority in the court to try civil and misdemeanor cases except when the record shows a waiver by consent: *King v. Burdette*, 12 W. Va. 688; *Ramsburg v. Erb*, 16 W. Va. 777; *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296. In some jurisdictions there is a presumption of waiver when the record is silent on the subject: 17 Am. & Eng. Ency. of Law, 1103, 1109; but, where the mode of waiver is prescribed by statute, that mode is generally held to be exclusive: 17 Am. & Eng. Ency. of Law, 1099.

In a trial upon the petition, it will be competent for a jury, or the court trying in lieu of a jury, to inquire into the bona fides of Horner's purchase. Fraud, if proven, will vitiate the sale, and it is within the legislative power to dispense with a plea or other specification setting it up by way of defense on the question of title. "It is as competent for a jury to investigate fraud as a chancellor; the evidence to sustain actual fraud must be the same, in substance and effect, in one forum that it is in another": *Baltimore etc. R. R. Co. v. Lafferty*, 2 W. Va. 104; ⁴⁴⁰ *Baltimore etc. R. R. Co. v. Laffertys*, 14 Gratt. 478; *Jones v. Wood*, 16 Pa. St. 25; *Wilson v. York etc. R. R. Co.*, 11 Gill & J. 58.

For the reasons aforesaid, the decree must be reversed and the cause remanded for trial upon the petition of the appellant, Horner, in accordance with the principles herein

stated, and, further, according to the rules and principles of equity.

The Issuance of a Stock Certificate is not necessary to constitute one a shareholder in a corporation; the certificate is merely evidence of his title to shares of stock: *Butler's University v. Schoonover*, 114 Ind. 381, 5 Am. St. Rep. 627; *Cartwright v. Dickinson*, 88 Tenn. 476, 17 Am. St. Rep. 910; *Holland v. Duluth Iron etc. Co.*, 65 Minn. 324, 69 Am. St. Rep. 480.

Corporate Stock is, to a limited extent, negotiable: *Bank of Caloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115. As to the necessity of entering a transfer of stock on the books of the corporation, see *People's Bank v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144; *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961; *First Nat. Bank v. Holland*, 99 Va. 495, 86 Am. St. Rep. 898, and cases cited in the cross-reference note thereto; *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412; *In re Argus Print. Co.*, 1 N. Dak. 435, 26 Am. St. Rep. 639. One is not deprived of his character of bona fide purchaser of stock, according to *Havens v. Bank of Tarboro*, 132 N. C. 214, 95 Am. St. Rep. 627, by the fact that the certificate is not surrendered and the transfer noted on the company's books, although the certificate declares that it is transferable only on the books of the corporation. On the general essentials of a transfer of stock, see *Sparks v. Hurley*, 208 Pa. St. 166, 101 Am. St. Rep. 926.

UHL v. OHIO RIVER RAILROAD COMPANY.

[56 W. Va. 495, 49 S. E. 378.]

SURFACE WATER.—The Owner of Property may consume the surface water of his premises, or obstruct or divert the flow of it, without incurring any liability to his neighbors, whether above or below him, although they may be injured by the act, provided the interference does not amount to a collecting of the water on his own land into a body and discharging it as such upon his neighbors' premises. (p. 971.)

OVERFLOW WATERS—Whether Part of Stream.—The overflow waters of a river at times of ordinary flood, whether standing motionless upon the adjacent land or sweeping over it, do not cease to be a part of the stream, unless so separated from it as to prevent their return. (p. 980.)

OVERFLOW WATERS—Obstruction by Railroad.—The failure of a railroad company to make culverts in its embankments of sufficient capacity to permit the overflow water from an adjacent river to rise and fall with the stream, is negligence, creating a liability to a property owner thereby injured. (p. 982.)

APPEAL—Review of Quantum of Damages.—When no objection has been made in the trial court to a verdict upon a demurrer to the evidence, the quantum of damages is not subject to review in the appellate court. (p. 983.)

J. W. Vandervort and Van Winkle & Ambler, for the plaintiff in error.

V. B. Archer and William Beard, for the defendant in error.

⁴⁹⁵ POFFENBARGER, P. This case calls upon the court to say whether injury to real estate resulting from interference with the overflowing waters of a navigable river, at a point outside of its banks, by means of an embankment, gives a right of action for damages. There is practically no controversy as to the facts, and, in all material respects, the question is one of law. The defense is predicated mainly upon three propositions: 1. That such waters are deemed to be surface waters; 2. That even if, by the common law, such waters in England constitute part of the river, the rivers of this country, by reason of their size and character as great navigable bodies, would, on the general principles of that law, be excepted from the rule, and classed with the waters of the sea; 3. That the overflow was the result of an extraordinary rise in the river, the consequences of which the defendant was not bound to anticipate or provide for in the construction of its embankment.

Winnie Uhl was the owner of a lot, situated in the town of ⁴⁹⁶ Williamstown on the Ohio river, with a frontage of thirty-seven feet on a street running practically parallel with the river, and lying between the lot and the river. From the street the lot falls away into a depression, in the lowest part of which there is a small channel in which, during part, or all, of the time, there is a stream of water, fed by springs, which carries, in addition to the water from the springs, the surface water from the basin. Passing on below the limits of plaintiff's property, this depression reaches the river at some point not far distant. The defendant located its railroad on the street in front of plaintiff's property, and, passing on down the river, crossed the depression a short distance below it. In the construction of its road the defendant threw up an embankment in the street in front of plaintiff's property, the top of which is three feet above the level of the lot and maintained it at about the same height to a point beyond the depression. At the crossing of the drain, the elevation is ten to fifteen feet, and at that point a small opening is made in the fill, called a culvert. The culvert is three feet square on one side, and eighteen inches by two feet on the other. It is sufficient to carry the waters accumulating in the drain from the springs and from the surface, but insufficient

to let in the waters from the river, when rising, fast enough to make the rise in the basin keep pace with that of the waters of the river, and to allow the waters in the basin to subside, when the river is falling, as fast as the river goes down. In the flood of 1898, this resulted in the injury complained of. The river rose rapidly and attained a very high stage. When the river reached the top of the railroad company's embankment, the water in the basin had not attained that height by about seven feet, according to the testimony of witnesses, and the waters from the river flowed over the embankment and fell upon the plaintiff's premises, tearing up and washing away the soil, undermining the foundations of buildings, flooding a cellar, loosening from its anchorage a frame building, called a cooper shop, containing tools, materials and barrels, and causing the same to float and finally to be carried away. When the river subsided, the outflow of the waters in the basin was so impeded by the embankment, with its insufficient culvert, that water remained upon the lot much longer than it would have done but for the interference of the embankment.

497 In order that the discussion of the main proposition may be unembarrassed by any consideration of the rules of pleading, the action of the court in overruling the demurrer to the declaration will be passed for the present.

The space taken up in the briefs with the discussion of the distinction between the principles of the common law and the Roman civil law, governing the rights of parties in respect to surface waters, and of the decisions in those states which have adopted the principles of the civil law on that subject, serves the purpose of a caution to the court to observe that distinction in attempting to analyze the cases as reported and deduce from them rules and principles applicable to the questions here presented. In *Neal v. Ohio River R. Co.*, 47 W. Va. 316, 34 S. E. 914, *Jordan v. City of Benwood*, 42 W. Va. 312, 57 Am. St. Rep. 859, 26 S. E. 266, 36 L. R. A. 519, and other cases, this court declares the common-law rule on the subject of surface waters to be the law of this state. By that law the owner of property may consume the surface water of his premises, or obstruct or divert the flow of it, without incurring any liability to his neighbor whether above or below him, although he may be injured by the act; provided that the interference does not amount to a collecting of the surface water on his own land into a body and dis-

charging it as such upon his neighbor's premises: See *Gillison v. City of Charleston*, 16 W. Va. 283, 37 Am. Rep. 763; *Knight v. Brown*, 25 W. Va. 808; *Norfolk etc. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517; *Gould on Waters*, sec. 271; *Field v. Inhabitants*, 36 N. J. Eq. 118.

Neither the decided cases nor the text-books point out any material distinction between the two systems of law respecting the rights of riparian owners as regards natural water-courses. Hence, if the waters of a river which spread over the adjacent low lands in times of freshets and floods are not surface waters within the meaning of the common law, as to which only that law departs from the principles of the civil law, but remain part of the stream, there is no basis in reason or law for any conflict in the decisions, respecting the rights of riparian owners as to property affected by such water. As the Roman civil law makes no distinction between the waters of natural streams and surface waters, it is reasonable to assume that the courts of those states which have adopted it would be uninfluenced, in classifying waters and determining what are, and what are not, surface waters, by any insensible bias or prejudice, such as might ⁴⁹⁸ induce courts of the other states to include in surface waters what does not properly belong to that class. But as the distinction is usually comparatively unimportant in those courts, it may be assumed that they have not bestowed upon the subject as much care and labor as have the courts that observe the other rule. Making due allowance for all this, we are disposed to avail ourselves of such light on the question as those decisions may afford.

In Ohio, the civil law is followed: *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732. The supreme court of that state, in *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429, declines to consider overflowing waters of a river as surface water. In the opinion, at page 282, Minshall, Judge, says: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that when swollen by rains and melting snows it extends and flows over the bottoms

along its course, that is its flood channel, as when, by droughts, it is reduced to its minimum, it is then in its low-water channel. Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream, and ceases to be surface water."

Georgia is classed as a state in which the rule of the civil law is adhered to, though the court has made no express declaration to that effect, and, in *O'Connell v. East Tennessee etc. Ry. Co.*, 87 Ga. 246, 27 Am. St. Rep. 246, 13 S. E. 489, 13 L. R. A. 394, Lumpkin, Judge, in an able opinion, expressly repudiates the theory that such waters are surface waters within the meaning of either the civil or the common law, and the decision of the case rests upon that ground. In the opinion, at page 253, it is said: "The surplus waters do not cease to be part of the river when they spread over the adjacent low grounds, without well-defined banks or channel, so long as they form with it one body of water eventually to be discharged through the channel proper."

⁴⁹⁹ In Missouri, the common law was at one time rejected, in so far as it relates to surface waters, and afterward adopted. In *McCormick v. Kansas City etc. R. R. Co.*, 57 Mo. 433, and *Shane v. Kansas City etc. R. R. Co.*, 71 Mo. 237, 36 Am. Rep. 480, it was held that an owner of land could not stop the natural flow of surface water or divert its course so as to throw it upon the land of his neighbor. In the latter case, the court held that: "Overflowing water from a river in time of flood is surface water within the meaning of this rule." The decision was by a divided court, and the opinion somewhat inconsistent, as declared in the case next to be noticed. The principle of these two cases was discarded in *Abbott v. Kansas City etc. R. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581. This was a case of obstruction to a natural watercourse by the erection of a bridge, but the second count in the petition charged an interference with the surface waters "which fell and ran down from higher ground," and the case did not concern the overflow of the river.

The Minnesota court, up to 1888, did not seem to have taken any position with reference to the two systems of law, and, in *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212, 8 Am. St.

Rep. 668, 36 N. W. 339, it is expressly held that: "The water which in times of ordinary high water overflows the banks of a stream, and is accustomed to flow down over the adjacent lowlands, in a defined stream, is subject to the law relating to watercourses, rather than to that of surface water." This implies a leaning toward the common-law rule, otherwise it would be unnecessary to note any distinction between the two kinds of water. In Oregon, the court, without considering the doctrine of dominant and servient heritage of the civil law, respecting surface water, held that: "A stream does not cease to be a watercourse and become mere surface water because at certain points it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel": *West v. Taylor*, 16 Or. 165, 13 Pac. 665.

In Iowa, the court seems to lean toward the rule of the civil law, and in *Sullens v. Chicago etc. Ry. Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545, it is held that where, by building an embankment across a wide creek bottom, a railroad company caused the surface water of the bottom to flow into the channel, and then to leave it far above the culvert and flow over plaintiff's land, and then be turned back into the channel again above the culvert, the water was no longer to be considered surface water. This seems to have been nothing more ⁵⁰⁰ than an interference with a natural watercourse. The embankment and culvert caused the creek to leave its course and spread over the land and then go back into its course. Hence, the decision has very little bearing on this question. In *Moore v. Chicago etc. Ry. Co.*, 75 Iowa, 263, 39 N. W. 390, the court decides that water which, in the time of a freshet, leaves the channel of a stream and spreads over the bottom land, and is forced back into the channel again by a railroad embankment built across its course, is not to be regarded as surface water in considering the sufficiency of the culvert constructed in the embankment. This seems to be another case of mere obstruction to a natural watercourse.

Coming now to the decisions of courts which apply the principles of the common law in determining the rights respecting surface water, we find that in Indiana it has been held in more than one case that the waters of a river spreading over depressions in the land in the time of a flood are held to be surface water: *Shelbyville etc. Turnpike Co. v.*

Green, 99 Ind. 205; Cairo etc. R. R. Co. v. Stephens, 73 Ind. 278, 38 Am. Rep. 139.

In New York, the surplus water of a stream when flooded is undoubtedly regarded as a part of the stream. Thus, in *Wallace v. Drew*, 59 Barb. 413, it is held that: "It is well settled that every person through whose land a stream of water flows may construct embankments and other guards on the bank, to prevent the stream washing the bank away and overflowing and injuring his land. But in doing this, he must be careful so to construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go, in ordinary floods; otherwise he will be liable for the injury. But this rule does not apply to floods altogether extraordinary and unusual." This proposition was adopted from Angell on Watercourses, section 334, and that work adopts it from *Rex v. Trafford*, 1 Barn. & Adol. 874, a case to be noticed later on.

Though not exactly in point, *Burwell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247, is said to bear upon the question, and tends strongly to uphold the view that flood waters are to be considered a part of the stream. The syllabus reads as follows: "H., owning lands on both sides of a creek which frequently overflowed its banks, built a dike along the south side of it, to protect his low grounds on that side of the creek; and this caused the creek to overflow the land on the north side still more. At his death his lands were ⁵⁰¹ divided by commissioners, who allotted to one of his children the land on the south side of the creek, and to another, W., the land on the north side. And in their report they made no allusion to the dike. The son receiving the land on the south side of the creek afterward sold it to B.; and then W., owning the land on the north side, commenced to build a dike on that side, to protect his lands, which would have the effect to destroy the dike built by H. and overflow the low grounds on the south side. B. then filed a bill to enjoin the building of the dike on the north side. Held: 1. B. is entitled to have his dike as it was when H. died, and to have his lands protected thereby; and W. has no right to build a dike on his side of the creek, which would destroy the dike of B. and overflow his low grounds; 2. Equity will interfere to prevent the building of the dike; and will compel W. to abate so much of his dike already built as would injure the dike and low grounds of B." This case follows the principle laid down in

Angell on Watercourses, just referred to, and is based upon the English decisions. It is urged that the embankment, made by the ancestor, was not for the purpose of controlling the flow of the water when the stream was within its banks, but only to protect certain land when it overflowed its banks. By this dike he had thrown the water to one side of the stream and left the land on that side to his son subject to the burden of the surplus water. While owner of the entire tract, the ancestor had altered the course of the stream on his own premises, as he had a clear legal right to do (Gould on Waters, sec. 213), but, after the division of the estate, neither of the several owners could so interfere with the stream as to injure the other. When, by the counter dike, the superabundant waters of the flood stage were confined within the channel, caused to overflow land on the opposite side, and kept off the land, the court declared the act to be an actionable obstruction of the stream, and not a mere rightful repulsion of surface water.

The claim of analogy between the case of *Burwell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247, and the case now in hand seems to be sustained by the views of Judge Moncure, in applying to that case the principle declared in *Rex v. Trafford*, 1 Barn. & Adol. 874, in which the overflowing waters of a stream formed the subject matter of the controversy. Embankments, called fenders, had been erected by the owners of lands bordering on a stream, to prevent it from overflowing their lands in times of freshets and floods. These embankments were increased in height, from time to time, and finally resulted in throwing such a large body of water into the channel of a river into which the brook emptied, that it endangered certain canal banks and aqueduct and obstructed navigation in the canal. Neither the aqueduct nor the canal banks was in any degree the cause of the overflow. It had occurred before the erection of the canal and in times beyond the memory of man. Arches had been made in the aqueduct at points distant from the river to permit this overflowing water to pass through it. Upon the special verdict showing all the facts, the court of king's bench held: "That the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood water had been accustomed to run; that there was no difference in this respect between flood water and an ordinary stream." In the opinion, Lord Tenterden, C. J., said:

“The consequence of a judgment requiring the fenders to be reduced may be the production of much mischief in times of flood, not only to the lands of the defendants, but also to a considerable tract of country, unless some other method can be found of carrying off the flood water. But this consequence cannot be properly attributed to the erection of the canal, as any blame either in its projectors or present proprietors. On the contrary, it distinctly appears, that at the formation of the canal a sufficient provision was made for carrying off the flood water in the course which it had previously taken, by the erection of the three arches; and these arches would continue to be sufficient, notwithstanding any increase of water by the improved drainage of the country above, if the ancient course and outlet of the flood water had not been obstructed by the erection of the fenders. Now, it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction.” In *Burwell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247, Judge Moncure says the king’s bench ⁵⁰³ judgment in *Rex v. Trafford*, 1 Barn. & Adol. 874, was reversed in the exchequer chamber, “but that court agreed in the principle laid down by the court of king’s bench, though it did not discover upon the special verdict a finding of sufficient facts to warrant its application to the case.”

Lawrence v. Railroad Co., 16 Q. B. 643, 20 L. J. Q. B. 293, 15 Jur. 652, 71 Eng. Com. L. 643, deals expressly with the subject of flood waters as affected by a railroad embankment. The facts were such as to make it identical in principle with the case now in hand. They are stated by Patteson, Judge, as follows: “The plaintiff . . . brings this action for an injury to his land by its being flooded, as he alleges, by the fault of defendants in constructing their railway across the lands of other persons without leaving sufficient openings for the passage of flood water, whereby they were obstructed and penned up and forced upon the lands of the plaintiff.” In the opinion, he says: “The railway passes across the low lands

adjoining the river Dun, over which the flood waters of that river used to spread themselves. Those low lands were separated from the plaintiff's land by a bank constructed under certain drainage acts, and which protected the plaintiff's lands from floods. By the construction of the defendant's railway without sufficient openings, those flood waters could not spread themselves as formerly, and were penned up, and flowed over the bank on the plaintiff's land. Prima facie this would give the plaintiff a cause of action; and the question is whether the company are protected by their act." The court held: "That, although the company were not required by their act to make flood openings to their embankment, and would not be compellable by mandamus to make them, yet, as they might, by proper caution, have prevented the injury sustained by the plaintiff, an action on the case was maintainable against them for such injury." This means that the act of constructing the embankment was not wrongful because the act of parliament had authorized it, just as we hold now that the construction of a work of internal improvement, authorized by law cannot be enjoined or controlled by the court, but that the company constructing such works is answerable to the land owner for such damages as may result to him, and particularly for damages resulting from negligent or unskillful construction of the work: *Arbensz v. Wheeling etc. H. R. Co.*, 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Spencer v. Ft. Pleasant etc. R. R. Co.*, 23 W. Va. 406. By saying ⁵⁰⁴ that prima facie this would give the plaintiff a cause of action, the judge meant that if the construction of the railroad had not been a public work, authorized by law, it would have been wrongful, and the embankment might have been abated as a nuisance.

These English decisions must be accepted as being declaratory of the common law. They were adopted and approved as correctly announcing the law by the Virginia court prior to the division of the state. The interpretation put upon them by that court must be accorded great weight here, because the Virginia decisions rendered prior to the division of the state are as binding upon this court as its own decisions. The two cases above referred to deal with the flood water of streams, and apply the same principles to it that are applied by the common law to natural watercourses themselves. They utterly preclude the assumption that such wat-

ers are surface waters, and class them with the waters of natural streams.

In some of the American cases in which ordinary flood waters are held to be waters of the stream, stress seems to be laid upon the fact that the flood waters maintain a current, and do not stand upon the ground as backwater, motionless as a pool. *Lawrence v. Railway Co.*, 16 Q. B. 643, 30 L. J. Q. B. 293, 15 Jur. 652, seems clearly not to recognize any such distinction; for in the course of the opinion it is said the flood waters of the river used to spread themselves over the lowlands, just as they do in this country, and that, by the construction of the railway embankment, they were prevented from spreading themselves as they had formerly done and flowed over the bank onto plaintiff's lands. This imports that, by the railroad embankments, the waters were confined to smaller limits, and thereby raised to a higher level, so that they overflowed the bank which had formerly been of sufficient height to protect plaintiff's land. At any rate, they are not referred to as waters flowing over the land outside of the banks of the river and maintaining a current.

The Indiana decisions are clearly at variance with the application of the principles of the common law made by the English cases. They recognize nothing as overflowing river water unless it flows practically all the time. Such waters as are alluded to in *Lawrence v. Railway Co.*, 16 Q. B. 643, 30 L. J. Q. B. 293, 15 Jur. 652, and *Rex v. Trafford*, 1 Barn. & Adol. 874, as flood waters flowing beyond the limits of the stream, are classed as surface waters, although they maintain a current over the ⁵⁰⁵ land. Thus, in *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114, the court, in its opinion, at pages 172 and 173, says: "In the complaint before us, there is no averment of any watercourse, except, indeed by way of parenthesis, that the place, during floods, is a part of the Ohio river; but the facts averred clearly show that it is not upon the bed of the river, nor within its channel, nor between its banks; in short, that it is no part of a watercourse, but that the flow is over the entire surface of the land, is occasioned by temporary causes, and is not usually there. The rights of the appellee, therefore, are such as a proprietor may have in surface water, which, as we have seen, is a part of his land; and the injuries or inconveniences which the appellant is alleged to have suffered are such as arise



from the changes, accidents and vicissitudes of natural causes."

The reason for this departure is found in the nature and situation of the lands of that state, for in the same case, which is referred to in subsequent cases as a leading case in that state, the court says: "The doctrine contended for by the appellant, applied to the vast alluvial regions—so generally level, subject to occasional inundations—bordering upon the Ohio river, and lying along other rivers and large streams within this state, would very much embarrass agricultural and general improvement, by preventing proprietors of lands from securing their fences by planting trees, or other permanent methods, and in some instances, perhaps, render large portions of our richest soil useless. While the owners of lands may not obstruct watercourses to the injury of others, they must be permitted to fence and cultivate their fields and improve their lands in the way which best subserves their interest, without being responsible for the accidents of floods, or the shiftings of surface water occasioned thereby, although sometimes slight and temporary injuries may result therefrom to adjoining owners. These are accidents which must be borne alike by all." This sounds very much like a declaration of state policy, designed to facilitate the cultivation of vast areas of low and swampy lands, subject to frequent overflow, in the interest of the general welfare of the people of those sections of that country and of the whole state, but the situation may fully justify it as a necessary modification.

Though the flow or current of a watercourse is one of its pronounced characteristics, it is at variance with common knowledge and reason to say that only such water of a stream as is ⁵⁰⁸ perceptibly moving may be considered a part of it. When one stream, uniting with another, obstructs its flow by reason of its running bank full, while the other is low, and causes such other stream to be filled with back water, can it be said that, so long as the backwater stands, it is only surface water? Are all the motionless pools within the banks of a river, produced by the windings of its channel and current, to be called surface water? Nobody has ever ventured such an unreasonable suggestion. If it be conceded that the running waters of an overflowing river on the low lands outside of its banks do not cease to be part of the river, as clearly they do not, what reason can be assigned for a distinction outside of the banks which cannot exist within them? The

standing waters are supported and maintained by the great body of water forming the river. From bank to bank, surface to bed, within the banks and beyond them, as far as the water stands or flows, all the atoms or parts are, for their positions, interdependent and inseparably united save when absolutely severed. If from the lowest point in the bed a large quantity should be removed, a subsidence of the entire surface would result, each particle finding a lower level by the law of gravitation. That part of the water which flows is simply seeking what the standing water has already found, its level. By nature, it is all one body, until severed in some way, and the law suggests no reason or principle upon which what clearly is not severed can be deemed to have been cut off.

No doubt such water often becomes so separated from the river as to justify its classification as surface water. On the low lands along our rivers, there are depressions having no outlets to the river or elsewhere, and in which, when filled, the water must stand until it passes away by evaporation through the air and percolation through the soil. These are filled by overflow in times of flood, and, upon the recession of the river, are left full of water. This overflow water is thereby effectually severed from the waters of the river, and, no doubt becomes, under the decisions, surface water.

The suggestion that the rules governing the rights of riparian owners in respect to our great rivers should be different from those applicable to the small English streams is a novel one, not expressed by any of the decided cases. Shall they be likened unto the high seas merely because our public policy has classed them as navigable waters beyond the limits of tide water,⁵⁰⁷ while the English streams are not, and because we deny to riparian owners any exclusive right to the bed or shores, inconsistent with the public right of navigation, as a matter of public necessity and convenience in the interest of commerce and the public welfare? If we did so, we would do it for a reason other than that assigned as justification for embanking against the waters of the sea, namely, that their breaking in upon the land is due to unknown causes, and cannot be anticipated. They suddenly come where they have never before been known to occur and may never be repeated, unlike the floods of inland streams, recurring year after year in obedience to well-known natural laws and causes. Everybody is bound to take notice of them, and as to them no man can be heard to set up his ignorance.

The public nature of our natural streams argues the exact contrary of the proposition suggested. Neither by embankment or other structure can a riparian owner obstruct or alter them to the injury of the public. The sea may be fenced out to the utmost extent of man's ability, and there will still remain ample room for the world's commerce, but a very small obstruction may seriously impair the usefulness of a great river.

The tremendous extent and weight of the overflow of our great rivers makes it all the more necessary to adhere to common-law principles. A diversion of the course of these irresistible bodies of water results in great injury and possible disaster. It is only because of their comparative slowness in quantity and incapacity to do injury that the law allows the owner of land to do as he pleases with the surface waters on it or that would come to it. When he collects and forms them into a body, and thus makes them injurious and hurtful, the law prohibits him from turning them upon his neighbor. The clearing away of the forests, by reason of which the streams rise higher and more quickly than when the fallen leaves, moss and muck held back the waters in the forests, and the draining of the swamps and low lands, only emphasize this view. Of all these changes, persons dealing with the waters of the river must be deemed to have notice, too.

For the foregoing reasons, we conclude that the overflow water of a river, at times of ordinary flood, whether standing motionless on the adjacent land, or sweeping over it, do not cease to be part of the river, unless so separated from it as to ⁵⁰⁸ prevent its return. From this it follows that by preventing the gradual rise of the water over plaintiff's lot, by damming it and raising its level so as to cast it down in the form of a cataract or waterfall upon her grounds, and thus causing injury which would not otherwise have occurred, is such an interference with the stream as, by the common law, gives a right of action, and the same legal result arises from the prevention of the outflow of the water from the basin, in consequence of which it remained upon the land longer than otherwise it would have remained there, unless the flood was extraordinary, an act of God. A larger culvert would have rendered the embankment uninjurious to plaintiff's property in these respects, and the failure to make it of sufficient size to carry the water is negligent construction. Though the defendant could lawfully build the embankment, in doing so,

it was bound to use the engineering knowledge and skill ordinarily applied in the erection of such works. It must be carefully and skillfully done: *Taylor v. Baltimore etc. R. R. Co.*, 33 W. Va. 39, 10 S. E. 29.

Whether a flood is extraordinary is generally, though not always, it seems, a question of fact for the jury: *Pittsburg etc. Ry. Co. v. Gilleland*, 56 Pa. St. 445, 94 Am. Dec. 98; *Brown v. Railway Co.*, 8 Am. & Eng. R. R. Cas., N. S., 693. If, therefore, the evidence is such as would warrant a finding that the flood in question was not extraordinary, the demurrer to the evidence cannot be sustained on the theory that it was extraordinary, as the demurree is entitled to the benefit of all inferences of fact that may be fairly deduced from the evidence: *Garrett v. Ramsey*, 26 W. Va. 345; *Gunn v. Ohio River R. R. Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575; *Mapel v. John*, 42 W. Va. 561, 57 Am. St. Rep. 839, 24 S. E. 608, 32 L. R. A. 800. According to the evidence, the river is subject to frequent rises of varying height and rapidity. That of 1884 was higher than that of 1898. The water had been on a level with the street ten or twelve times in a period of fifty years. One witness says that of 1898 was an unusual flood, but a jury would not be bound to accept his opinion. The facts attending the rise in question were not shown to have been without precedent as in all cases in which great floods have been classed as acts of God, such as the Johnstown Flood: *Long v. Pennsylvania R. R. Co.*, 147 Pa. St. 343, 30 Am. St. Rep. 732, 23 Atl. 459, 14 L. R. A. 741; *Wald v. Railroad Co.*, 5 Am. & Eng. R. R. Cas., N. S., 70; the flood of 1852, in the Congaree river, the greatest freshet ever known in that country; *Lipford v. Charlotte etc. R. R. Co.*, 7 ⁵⁰⁹ Rich. (S. C.) 409; or that which submerged Chattanooga in 1867 and broke up all roads leading into it, and as to which the proof showed "beyond question that such a flood had never occurred" at that place "within the memory of man, the old inhabitants, who had witnessed other remarkable overflows since 1826, never having seen such a one": *Nashville etc. R. R. Co. v. David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594. The evidence shows variableness and irregularity in the rises to which the river is subject, and one much higher than that of 1898 had occurred just about the time the road was built. Unlike the ocean tides, freshets and floods in streams are governed by no fixed rules as to volume or the time in which they gather, and the facts disclosed by the evi-

dence are not such as would call upon a jury to pronounce the flood extraordinary in character.

Practically all that is urged upon the demurrer to the declaration, not disposed of by the general principles already discussed, is that the declaration does not aver that the defendant constructed the embankment, nor the height attained by the water and the rapidity with which it rose. The amended declaration does aver the building of the embankment by the defendant, and no principle of pleading, requiring so much of detail as is suggested by the other objection, is referred to. A declaration need not set out evidential facts.

The jury fixed the damages at three hundred and sixty-two dollars, of which three hundred and thirty-seven dollars is for the cooper-shop and contents washed away, and twenty-five dollars for injury to the surface of the lot. No objection to this finding was made in the trial court by motion to set the verdict aside or otherwise, but the plaintiff in error now insist that the judgment should be reversed because the embankment did not cause the loss of the cooper-shop with its contents, the water having been so deep it would have floated away anyhow, and because some of the tools and materials in it were the property of plaintiff's husband, he having purchased them. This is an exception to the action of the jury in assessing the damages, which cannot be made in the appellate court. Only the rulings of the trial court may be reviewed here. Upon the demurrer we can only say whether the evidence sustains plaintiff's right to the damages, for that is all the lower court considered. It was not requested to rule upon the correctness of the finding of the jury, as to the quantum of damages. Its action is a prerequisite to ⁵¹⁰ the exercise of any jurisdiction by this court: *Riddle v. Core*, 21 W. Va. 530; *State v. Phares*, 24 W. Va. 657; *Brown v. Brown*, 29 W. Va. 777, 2 S. E. 808; *Proudfoot v. Clevenger*, 33 W. Va. 267, 10 S. E. 394; *Humphrey v. West*, 3 Rand. 516; *Barrett v. Raleigh Coal Co.*, 55 W. Va. 395, 47 S. E. 154.

Seeing no error in the judgment, we must affirm it.

If the Flood or Overflow Water from a River becomes severed from the main current or leaves it never to return and spreads over the lower ground, it becomes surface water, but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs therefrom presently to return, it is still regarded as a part of the stream, and cannot be obstructed to the injury of the property of another: *Fordham v. Northern Pac. Ry. Co.*, 30 Mont. 421, 104 Am. St. Rep. 729, and see the cases cited in the cross-reference note thereto. The right of one land owner to accelerate or impede the flow of water to or from the lands of another is discussed in the monographic note to *Mizell v. McGowan*, 85 Am. St. Rep. 707-735.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

NORTHERN SUPPLY COMPANY v. WANGARD.

[123 Wis. 1, 100 N. W. 1066.]

PLEADING—Waiver of Reply to Counterclaim.—If a reply is necessary in order to put the allegations constituting a counterclaim in issue, it is waived by treating the counterclaim as at issue by going to trial upon the merits, and proceeding thereon till near the close thereof before requiring such reply. (p. 986.)

CONTRACTS—Warranties—Authority of Agent.—If a contract of sale is in writing and contains no express warranty, the question whether the vendor's agent who made the contract had authority to bind his principal by warranty is immaterial. (p. 986.)

CONTRACTS—Warranty—Representations of Agent.—If a contract of sale is in writing and contains no express warranty, the question whether certain representations made by an agent at the time that he made the contract were statements of fact or mere expressions of opinion is immaterial. (p. 987.)

CONTRACTS—Warranty in Sales of Goods.—In a contract for the sale of a quantity of "good" potatoes, there is no implied warranty that the potatoes furnished will be fit for the purpose for which they were bought, and the only implied warranty is that the potatoes delivered will be of good merchantable quality, and free from latent defects not discoverable by ordinary attention on the part of the purchaser. (p. 987.)

SALES—Delivery of Defective Goods—Damages.—Under a contract for the sale of "good" potatoes to a retail grocer, the seller is chargeable with knowledge that the potatoes were likely to be mixed with others, and, if of an inferior quality and liable soon to decay, would injure such others, and he is liable for such injury resulting from the delivery of potatoes of an inferior quality. (p. 988.)

SALES—Delivery of Defective Goods—General Damages for breach of a contract of sale, by the delivery of goods inferior to those called for by the contract, are limited to the difference between the market value of the property delivered at the time and place of the delivery, and the value at such time and place the property would have possessed had it been according to contract, and a special verdict which fails to find such difference in value is fatally defective. (p. 989.)

SALES—Evidence.—If a contract for the sale of potatoes is in writing, evidence of oral statements as to how long the potatoes would keep is immaterial. (p. 990.)

SALES—Breach of Contract—Liability for Loss.—A seller of potatoes who delivers a grade inferior to that agreed upon is not liable for any loss which the purchaser could have prevented by the exercise of ordinary care. (p. 990.)

SALES—Liability of Purchaser—Duty to Avoid Loss.—If a purchaser of potatoes places them with others owned by him, and upon discovering a short time afterward that the last purchased potatoes were decaying and ruining the whole lot, does nothing save sort a few from time to time for his retail trade until the whole lot is decayed, the cost of such sorting is not the basis of damage, but the reasonable cost of removing the last purchased potatoes on discovering their condition is the extent of the purchaser's damage on such score. (pp. 991, 992.)

SALES, Liability of Purchaser.—Evidence of the best method of handling potatoes after they begin to decay is material as tending to show whether the purchaser of the potatoes exercised ordinary care to prevent unnecessary loss. (p. 992.)

EVIDENCE—Opinion.—Any Subject wherein a person may become specially learned or skilled is within the broad field of opinion evidence, and it is not confined to mere matters of professional or scientific knowledge. (p. 992.)

EVIDENCE—Opinion.—A witness specially qualified in that regard is competent to state whether in his opinion potatoes delivered under a contract of sale were of "good sound white stock." (p. 992.)

EVIDENCE—Opinion—Materiality.—If a written contract of sale calls merely for the delivery of "good" potatoes, opinion evidence as to whether those delivered were of "good sound white stock" is immaterial. (p. 992.)

SALES—Breach of Contract—Evidence.—If a written contract for the sale of potatoes does not specify what kind of soil they shall be produced in, evidence of the kind of soil in which they were grown is inadmissible. (p. 993.)

SALES—Inspection of Goods.—If there is nothing in a written contract for the sale of potatoes as to whether they were to be inspected and accepted or rejected upon their delivery to the purchaser, it is error to submit an issue on that question to the jury, and to instruct it to apply to the matter any special knowledge which it may possess. (pp. 993, 994.)

SALES—Inspection of Goods.—Upon the question whether a person of ordinary intelligence exercising ordinary care, by inspecting property purchased upon its delivery, could have determined whether it was of the kind and quality agreed upon, an instruction that the purchaser "would not be required to look at the whole mass in the car, or to look at them other than in a fair and reasonable way," invades the province of the jury, and is erroneous. (p. 994.)

A. H. Woodworth and Reid, Smart & Curtis, for the appellant.

G. M. Sheldon and Flett & Porter, for the respondent.

⁸ MARSHALL, J. Respondent's counsel contend that the assignments of error to impeach the judgment cannot properly affect it, since there was no reply to the counterclaim contained in the answer, and respondent was therefore entitled to the judgment obtained on the pleadings. If a reply were required, under the circumstances, in order to put the allegations constituting the counterclaim in issue, it was effectually waived by respondent's treating the same as at issue by going to trial upon the merits, and proceeding therein till near the close thereof before suggesting anything to the contrary: *Killman v. Gregory*, 91 Wis. 478, 65 N. W. 53; 18 Ency. of Pl. & Pr. 650.

Appellant contends that the judgment is not sustained by the verdict for several reasons, which will be considered:

(a) The verdict and judgment are based on express warranty and one essential fact to sustain that, since it is undisputed that the contract on appellant's part was made by its agent, was neither found by the jury, nor was there any evidence on the question, such fact being that such agent had authority to bind his principal by warranty.

Westurn v. Page, 94 Wis. 251, 68 N. W. 1003, and *Wanpaca E. L. & R. Co. v. Milwaukee E. R. & L. Co.*, 112 Wis. 469, 88 N. W. 308, support counsel's proposition as to the law, but it does not apply to this case, because the contract here was in writing, contained no express warranty, and ⁹ the cause was not properly treatable upon the theory that there was such.

(b) The jury should have been required to determine whether certain representations claimed to have been made by the agent at the time the contract was entered into were statements of fact or mere expressions of opinion.

We fail to see any application of the law touching that subject to this case. Since the contract between the parties was in writing, as before indicated, evidence as to what was said at the time of the making thereof, or prior thereto, or as to what was intended by the parties, or any oral evidence as to the terms of the agreement, or finding in respect thereto, independently of the writing, was immaterial. That seems to have been overlooked all through the trial. The failure to appreciate it needlessly complicated what would have otherwise been a very simple case. The sole source of information as to the terms of the contract is the memorandum of December 6, 1900, indicating that appellant agreed to sell to

the respondent and ship to him as ordered, at Tomahawk, Wisconsin, 400 bushels "s'k'd" potatoes, or more at thirty-one cents per bushel, and respondent's letter, dated October 11th thereafter, addressed to the appellant and directing it to ship six hundred bushels of good potatoes.

(c) There is no finding that the potatoes were not reasonably fit for the purpose for which they were bought, nor that any particular quantity of old potatoes was destroyed because the new ones were not suitable for such use.

No such finding was necessary. Counsel for appellant seem to think because the breach of contract found by the jury was that the potatoes delivered were not such as the agreement called for, that it entirely failed to make out a breach of implied warranty; that such warranty, if any existed, was that the potatoes should be reasonably fit for the purpose for which they were bought. In that counsel confuse ¹⁰ the implied warranty, which often exists, that an article sold for a particular purpose known to the vendor at the time of the sale, is reasonably fit for such purpose, with the implied warranty that an article delivered in consummation of an executory contract is of the kind agreed upon, as regards imperfections not discoverable at the time of the reception thereof by ordinary attention thereto on the part of the purchaser. The latter is the warranty which respondent was entitled to recover on in this case, if entitled to recover at all.

(d) The jury should have been requested to find as a fact whether there was an implied warranty of fitness that the property delivered was reasonably suitable for the use such property was intended for.

Here, again, counsel fail to appreciate that no such warranty was involved in the case; that the only warranty there was, if any, was against defects not permissible by the contract which were not discoverable by ordinary attention on the part of the purchaser, as before stated.

The sufficiency of the verdict is otherwise challenged, as will be hereafter shown.

The next assignment of error is that the finding in the special verdict, that the loss of the good potatoes, which respondent had when the new ones were received and placed therewith, was the direct and natural consequence of the breach of warranty complained of, did not justify, in any event, a recovery for such loss because there was no finding nor any evidence that special circumstances existed known

to the appellant, when the contract was made from which it should reasonably have apprehended that such loss was liable to occur by its breach of contract. It seems to us otherwise. The evidence was undisputed that appellant knew respondent was a retail grocer. Therefore it must have apprehended at the time the contract was made that the placing of the new potatoes with old ones was within the probabilities. Further, as a matter of common experience, appellant must have¹¹ known that the mixing of potatoes that were liable to soon decay with good ones would probably result in injuring the latter. So all the essentials of the rule necessary to charge appellant with the damages to the old potatoes, to the extent that they are attributable to the breach of contract complained of, were satisfied. True, appellant was not chargeable with any damages other than such as "may reasonably be supposed to have been in the contemplation of both parties when the contract was made as the probable result of the breach of it" (*Hadley v. Baxendale*, 9 Ex. 341, 2 C. L. R. 517, 23 L. J. Ex. 179, 18 Jur. 358, 2 Week. Rep. 302, as condensed and approved by this court in *Brown v. Chicago etc. R. R. Co.*, 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911), and that special circumstances enhancing the damages that would ordinarily occur must always be brought home to the knowledge of the person charged therewith as of the time the contract was entered into, or the sufferer will be left remediless therefor (*Guetzkow Bros. Co. v. A. H. Andrews & Co.*, 92 Wis. 214, 53 Am. St. Rep. 909, 66 N. W. 119, 52 L. R. A. 209); but that was all satisfied in this case as to the loss of the old potatoes, as we have seen.

Further complaint is made that, since the evidence was undisputed and all one way that all of the seventy-five bushels of old potatoes was destroyed by reason of the new ones being placed thereon, the verdict that only fifty bushels were so lost was based on mere conjecture. We are unable to see why complaint should be made by the appellant because the jury erroneously found against it for a less loss than the whole of the old potatoes, by reason of the contact thereof with the new ones, when the evidence was undisputed that all were so lost, if any were. Probably counsel for respondent would readily have consented to an amendment of the verdict in that respect. *Hickey v. Chicago etc. R. R. Co.*, 64 Wis. 649, 26 N. W. 112, condemning a verdict based on conjecture, so far as we can see, has no application here. There it was

clear that the verdict was a mere prejudicial guess, while, at the best, here all that is claimed is that the jury found against ¹² appellant for a loss less than that which the undisputed evidence established.

Did the court err in submitting to the jury this question, "Were all the potatoes, furnished by the plaintiff to the defendant, of the kind and quality agreed to be furnished?" It is insisted that such question was fatally defective because multifarious. We shall not follow the ingenious argument of counsel in support of that proposition to show what appears to us to be its obvious infirmity. The difficulty therewith, in the main, grows out of want of appreciation that respondent's claim was based wholly on breach of implied warranty that the potatoes delivered in execution of the written contract were free from latent defects rendering them not such potatoes as the contract called for. There was no need for any finding as to the terms of the contract, nor any finding as to the scope of the implied warranty. The former was in writing, the latter was a matter of law. The simple proposition submitted in the question quoted seems to be free from multifariousness by the most severe test that could be reasonably applied thereto.

The next assignment of error is, in effect, that the verdict is fatally defective for want of any finding of damages on a recoverable basis, or of facts of an evidentiary character from which the ultimate fact in that regard can be determined as a necessary conclusion. We see no escape from that contention. Respondent's general damages were limited to the difference between the market value of the property delivered at the time and place of the delivery and the value at such time and place the same would have possessed had it been according to the contract: *Aultman & T. Co. v. Hetherington*, 42 Wis. 622. There was no direct evidence on that point, nor was there any finding directly thereon. The finding that the potatoes were not all according to contract; that two hundred bushels were; that four hundred bushels thereof spoiled in consequence of not being such as the contract called for; that such ¹³ potatoes as were so called for, at the time and place for the delivery thereof, were worth thirty-one cents per bushel; and that none of the potatoes were spoiled through fault on the part of the respondent, if supported by the evidence at all points, yet failed to establish, as a matter of law, the market value of the potatoes delivered at the time and

place of the delivery. There should have been a specific finding on that point. It was a vital matter in the case. Why a question in respect thereto was not submitted to the jury, while a number of questions covering mere evidentiary matters were submitted, together with a number of questions which were entirely unnecessary, in view of the fact that the contract between the parties was in writing, is not easy to understand. It might well be that four hundred bushels of the potatoes delivered upon the contract spoiled during the course of four weeks after they were put into the respondent's cellar, and even without fault on his part, and yet that they were of some value when they were taken into his possession.

Complaint is made because the court refused to take a finding by the jury as to whether the appellant agreed that the potatoes would keep for any particular length of time. No such question was necessary since, as before indicated, the agreement was in writing, rendering all oral statements about the potatoes, at the time it was made, entirely immaterial.

The claim is made that the finding of the jury entirely freeing respondent from all responsibility for the destruction of either the old or the new potatoes, and charging appellant with the entire responsibility in the matter, is inconsistent in view of the undisputed evidence. It looks that way. The evidence shows that on the second or third day after the potatoes were placed in respondent's cellar he knew that they were dangerously defective and were liable soon to become entirely worthless; that he knew from day to day, after he first discovered such condition, that it was rapidly growing worse, yet that he made no attempt to remove the potatoes from the¹⁴ cellar, or to save the seventy-five bushels of old ones, but allowed all to remain as they were when he first discovered the danger, except as potatoes were picked over from time to time to obtain a few good ones for his retail trade, till the entire lot became a decayed, filthy, and worthless mass of material. In the face of that, the jury exonerated respondent from all blame for the destruction of the potatoes, both old and new, and yet decided that such destruction was the natural and direct result of the condition the new potatoes were in when received by him. The fact that four hundred bushels of the new potatoes spoiled after being placed in respondent's cellar was, as before indicated, only evidentiary of the value thereof when received. In no event could appellant be

properly charged with such result unless it was one to be reasonably apprehended by both parties at the time of the making of the contract as a circumstance probable to occur from the breach of it. If appellant is chargeable with knowledge that respondent was liable to put the new potatoes with the old ones, and that the end might probably be the destruction of both, certainly respondent is chargeable with such knowledge from the time he discovered the condition the new potatoes were in. With that in mind, the finding of the jury holding the former responsible for all that occurred after the new potatoes were placed in the cellar and exonerating the respondent from all fault, even for failing to make an effort to save the old potatoes from destruction and allowing the entire lot to remain in the cellar till it became a mass of filth, seems clearly absurd. It is considered that the findings by the jury, in view of the undisputed evidence, are inconsistent, and that the verdict exonerating respondent from all fault for the destruction of any of the potatoes is contrary to the evidence. That appellant is not chargeable with any loss which respondent could, by the exercise of ordinary care, have prevented, is elementary: *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590-606, 63 N. W. 1013; *Optenberg v. Skelton*, 109 Wis. 241-244, 85 N. W. 356.

It is contended that the finding as to the reasonable cost of assorting potatoes in the cellar and removing therefrom those which were rotten is not warranted by the evidence. Such finding was taken upon the theory that it was permissible for respondent to leave the potatoes in the cellar for several weeks, knowing they were rapidly becoming a mass of worthless material, and pay no attention thereto, other than to sort over a few now and then to obtain small quantities of sound ones to supply retail trade, and then charge appellant with the cost of such sorting, and that of removing the rotten mass that remained. That was by no means the reasonable charge for sorting potatoes and removing those that were rotten, having regard to the special damages for which appellant was liable. Clearly, as soon as it became apparent to respondent that the potatoes were rapidly decaying, which was in two or three days after they were received, he should have removed them from the cellar and saved the old potatoes. The reasonable cost of doing that would be the extent to which respondent could be said to have been damnified by the breach

complained of. What that would have been the record is entirely silent.

Testimony was ruled out as immaterial concerning the best method of handling potatoes upon its being discovered that they are in the condition those in question were found to be in two or three days after respondent received them. Such evidence was certainly not immaterial. It, at least, bore directly on whether respondent exercised ordinary care to prevent any unnecessary loss accruing because of the breach complained of.

A witness, against objection, was permitted upon a hypothesis supposed to be warranted by the evidence, to give his opinion as to whether the potatoes when they arrived at the ¹⁶ agreed place for delivery were of good, sound, white stock. It is suggested that the subject involved in the question was not one proper to be established by opinion evidence. It seems otherwise. It may well be that the condition of potatoes at one time may tell a far different story as to their condition a short time prior thereto, to a person of more than ordinary experience in observing such matters than to one who is not. Any subject wherein a person may become specially learned or skilled is within the broad field of opinion evidence: *Daly v. City of Milwaukee*, 103 Wis. 588, 79 N. W. 752; *Baxter v. Chicago etc. R. R. Co.*, 104 Wis. 307, 80 N. W. 644; 1 *Wharton on Evidence*, sec. 444. Such evidence is not confined to mere matters of professional or scientific knowledge. It extends to a very wide field, as an examination of the authorities in this court and elsewhere will readily show: *Leopold v. Van Kirk*, 29 Wis. 548; *Salvo v. Duncan*, 49 Wis. 151, 4 N. W. 1074; *Brabbits v. Chicago etc. R. R. Co.*, 38 Wis. 289; *Clason v. City of Milwaukee*, 30 Wis. 316; *Whitney v. Chicago etc. R. R. Co.*, 27 Wis. 327; *Curtis v. Chicago etc. R. R. Co.*, 18 Wis. 312; *Snyder v. Western Union R. R. Co.*, 25 Wis. 60; *Griffin & Skelley Co. v. Joannes*, 80 Wis. 601, 50 N. W. 785. Whether a particular matter is or is not a proper subject for such evidence, and whether the witness presented is or is not competent to testify because of having special knowledge in respect thereto is not always easy to determine. The questions in that regard, however, relate to mere competency, and, therefore, the trial judge's determination thereof, within all reasonable limits, is supreme. We see no reason to overturn the judge's ruling in the instance before us upon the ground that the testimony was immaterial because

the matter was not a proper subject for expert evidence. However, it was immaterial on another ground very clearly. The contract did not call for the kind of potatoes mentioned in the question. It merely called for good potatoes. Potatoes that were sound and reasonably good keepers, no doubt.

The court refused to permit appellant to prove what kind¹⁷ of soil the potatoes were grown in. That was proper. The assignment of error in respect thereto was doubtless made by reason of counsel's overlooking the fact, often alluded to, that the written contract, not the conversation in relation thereto, governed the matter. There was nothing in the writing as to what kind of soil the potatoes should be the product of.

Complaint is made because, in respect to the interrogatory as to whether the plaintiff knew when the potatoes were sold the purpose for which they were purchased, the court instructed the jury that knowledge of plaintiff's agent in respect to the matter was imputable to the principal. The question was asked as one bearing on whether plaintiff had, at the time the contract was made, knowledge of special circumstances as regards how respondent would probably handle the potatoes, rendering it liable for special damages. It is conceded that as to such matter the instruction was proper. The court, however, used language to the effect that the acts, statements and knowledge of the agent when the contract was made were binding on the principal. It is said that it informed the jury that plaintiff was bound by any warranty the agent may have made, though he was not specially authorized thereto by his principal. That may be, but there was no such warranty involved in the question, and it is not likely the jury understood the instruction to be broader than the subject to which it related, though it would be safer to use more guarded language.

The court instructed the jury on the question as to whether it was agreed that the potatoes should be examined when they arrived at Tomahawk and accepted or rejected before being taken from the car: "You are to bring your own knowledge and experience in determining what the evidence and all the evidence and circumstances submitted for your consideration applicable to this question really establishes and means."

¹⁸ The question itself was out of place. The written contract made no mention of any such agreement; moreover the instruction, so far as it permitted the jury to apply to the

matter any special knowledge of their own, was erroneous. That is according to elementary principles.

On the question as to whether a person of ordinary intelligence, in the exercise of ordinary care, by inspecting the potatoes after they arrived at Tomahawk, and before removing them from the car, could have determined whether they were the kind and quality agreed upon, the court instructed the jury in these words: "He would not be required to look at the whole mass in the car or look at them other than in a fair and reasonable way," etc. The complaint that the province of the jury was thereby invaded seems to be warranted. The nature of the inspection necessary to come up to the standard of ordinary care in the circumstances presented was wholly a subject for the jury to determine. Whether an examination sufficient to enable one to inform himself in a general way of the character of the entire car of potatoes may or may not have been required to come up to the necessary standard of care, was a jury question. There are but few situations where it is safe to instruct, as a matter of law, what is and what is not consistent with ordinary care.

Now, we have specially or generally considered all of the assignments of error. Those that have not been named specifically are involved in and decided with those which are. The judgment must be reversed and the cause remanded for a new trial. It is hoped that when such trial shall occur only the case made by the pleadings in view of the undisputed fact, that the potatoes were purchased under a written contract, will be tried and submitted to the jury; that all extraneous matters will be excluded. The contract must be held to determine the question as to the kind of potatoes which were bought. They were simply good potatoes. That doubtless called for potatoes of good merchantable quality,¹⁹ and that called for at least ordinary keeping qualities. When it comes to a question of damages it should not be forgotten, as to general damages, that the true standard for breach of implied warranty, as in a case of this kind, is the difference between the market value of the property delivered at the time and place it was received and the market value at such time and place of property of the kind the contract called for. In addition, such special damages as are properly claimed in the pleading, established by the evidence, and allowable by correct legal principles as herein outlined, may be recovered. Further, it must be borne in mind upon a second trial that it

was not consistent with ordinary care for respondent to allow the potatoes to remain in the cellar in contact with good stock, with knowledge of all the facts, till all the potatoes became a mass of filthy worthless material.

By the COURT. The judgment is reversed and the cause remanded for a new trial.

The Measure of Damages for a Breach of Warranty of quality of goods sold is usually the difference between the market value of the goods contracted for and of the goods delivered; and in an action for the price of the goods, the purchaser may interpose this difference as a defense pro tanto: Ogden v. Beatty, 137 Pa. St. 197, 21 Am. St. Rep. 862; Berry v. Shannon, 98 Ga. 459, 58 Am. St. Rep. 313; Meyer v. Green, 21 Ind. App. 138, 69 Am. St. Rep. 344. See, too, Vogt v. Schienebeck, 122 Wis. 491, 106 Am. St. Rep. 989, and cases cited in the cross-reference note thereto.

Warranties of Quality Implied in contracts of sale are discussed at length in the monographic note to Gold Ridge Min. Co. v. Tallmadge, 102 Am. St. Rep. 607-625.

JOHNSTON v. CHARLES ABRESCH COMPANY.

[123 Wis. 130, 101 N. W. 395.]

INSURANCE, FIRE—Property of Third Person Held on Bailment.—An insurance policy against loss and damage by fire of the stock and material of a specified person or company contained in a particular building, whether such stock and material are “either its own or held in trust, or on commission, or in storage for repairs, or sold and not delivered,” covers the property of a third person received by the insured to be repaired by him and thereafter held by him for the purpose of selling it for the owner, and in the building at the time it is destroyed by fire. (pp. 997, 998.)

INSURANCE, FIRE—Bailment.—A bailee or agent holding property for the purpose of repair, or of sale may insure it against loss or damage by fire for the protection of his special interest, and that of the owner, and such insurance may be taken in the name of the possessor, and, in case of loss, the avails of the policy may be applied, in satisfaction of his claim against the property, and, if there is an amount above such claim, he holds it for the owner. (p. 998.)

INSURANCE, FIRE—Bailment—Requisites of Contract.—If a bailee or agent holding property of another insures it against loss or damage by fire for the protection of his special interest and that of the owner, it is one of the requisites to the validity of the contract that it appear therefrom that such owner was within the contemplation of the parties when it was made, but it is not essential that the insurance fasten upon specific property, nor need the owner be known at the inception of the contract, and if such owner, when informed of the contract of insurance, assents to and adopts it, he

thereby becomes entitled to its advantages as fully as if originally made by his express authority. The right of such adoption and ratification continues while the contract is in force, and for a reasonable time after a loss thereunder. (p. 999.)

INSURANCE, FIRE—Bailment—Evidence to Vary Contract of Insurance.—If a bailee, holding the property of another, insures it against loss or damage by fire, for the protection of his special interest therein and that of the owner, the fact such owner was not a party to the contract of insurance at its inception, does not, after he has adopted and ratified it and after loss and notice, permit the parties and those claiming under them, to contradict, vary, or modify the contract by showing that it does not embody the agreement actually made. (pp. 999, 1000.)

INSURANCE, FIRE—Bailment—Apportionment of Loss.—If a bailee holding the property of another insures it against loss or damage by fire, for the protection of his special interest and that of the owner, and the latter ratifies and adopts such contract of insurance, he is, in case of loss, entitled to recover from whatever amount of insurance is paid, to indemnify the loss, such proportion as the value of his property bears to the whole amount paid, except that the bailee has the right to indemnify himself in full to the extent of his interest or lien on the property, out of the amount due for the loss. (p. 1000.)

PLEADING—Complaint Sounding in Contract, not Tort.—If the allegations of a complaint contain all the facts setting forth the contractual relationship of the parties, the defendant's fault in omitting to perform the obligation imposed thereby, and a consequent pecuniary injury to plaintiff, the complaint sounds in contract and not in tort. (p. 1002.)

Fiebing & Killilea, for the appellant.

Miller, Noyes & Miller, for the respondent.

133 SIEBECKER, J. On the former appeal of this case it was held as to the cause of action that "the facts stated in the complaint show that this is an action for money had and received"; and the court determined, upon the pleadings and evidence then before it, that, "upon this basis, when the plaintiff proved that no claim for the value of the property was made to or adjusted by the insurance companies, her cause of action entirely failed, and the motion for a nonsuit ought to have been granted." It is manifest from the opinion that this was the only question considered and passed upon by the court. After the case was remanded the trial court allowed plaintiff to amend her complaint by striking out certain allegations, and by inserting and adding new matter. The amendments were objected to for the reason that they entirely changed the cause of action from one in contract to one ¹³⁴ charging a tort. To determine the merit of this objection, it will be

best to consider first the nature of the insurance contracts involved, and the rights and liabilities of the plaintiff, the defendant, and the insurance companies under them. The condition of the policies upon which plaintiff relies to sustain her claim prescribed that the amount of insurance on stock should attach "to stock consisting chiefly of carriages, buggies, wagons, cutters, sleighs and other vehicles and parts of the same, manufactured and in process of manufacture, and all materials and supplies used in or appertaining to its business, either its own or held by it in trust or on commission, or in storage or for repairs, or sold but not removed." It is shown by the facts that the defendant was engaged in the business of manufacturing, buying, selling, and repairing various kinds of vehicles, and while so engaged, some time prior to April 13, 1898, received plaintiff's victoria for repairing it, and thereafter to hold it for the purpose of selling it for her. While it was so held, and while the insurance in question was in force, a fire occurred on this date in defendant's buildings, injuring them, and damaging, among other property, this victoria. Plaintiff on the day following the fire notified the defendant that she should look to it for indemnity for her loss under the insurance so effected in its name, and she so informed the representative of the insurance companies. Defendant denied all rights of the plaintiff to indemnity, and refused to include any damage to the victoria in the proof of loss under the policies, above the amount due it for repairs upon the victoria before the fire. It is contended in its behalf that the insurance effected by it covered only its interest in the property destroyed or injured by the fire. If this is the true meaning of the contracts, then plaintiff has no cause of action.

The meaning of these contracts, like that of all others, is to be ascertained from the phraseology employed by the parties as embodying their intention, in the light of the circumstances under which they were made. Turning to the clause ^{13^r} of the policies under consideration, it appears that the insurance companies agreed to insure against loss and damage by fire the stock and material contained in the specified buildings, "either its own or held in trust, or on commission, or in storage for repairs, or sold but not delivered." This language appears to us as clearly and definitely embodying an intention that the

insurance under the policies should attach to the property, in whichever of the conditions set forth it should be, whether owned by it, or owned by third parties but "held in trust," or under any of the other conditions specified by which it had the possession intrusted to it as representative of the owners, and for the return whereof it was responsible to them. There is no ambiguity in the subject or property insured, nor can we find any uncertainty in the interest insured. It includes the property of defendant and that of others held by it. To import into the policies the meaning contended for by defendant—that only its interest in the property held by it was insured—would require that terms of limitation be imported into the policies, so obviously necessary to give it such a meaning that it cannot be reasonably supposed they were omitted by the parties, and especially so in view of the plain and explicit declaration that the property itself is insured, against any loss or damage thereto, in amounts not exceeding the sum given in the policies. We are led to the conclusion that the policies cover the property, and are an insurance to indemnify against loss or damage to the property so covered, and that the contracts are without ambiguity or uncertainty: *Home Ins. Co. v. Baltimore W. Co.*, 93 U. S. 527, 23 L. ed. 868; *Waters v. Monarch F. & L. A. Co.*, 5 El. & B. 870, 25 L. J. Q. B. 102, 2 Jur., N. S., 375, 4 Week. Rep. 245; *De Forest v. Fulton F. Ins. Co.*, 1 Hall, 84; *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606, 6 Am. Rep. 146.

This leads us to ascertain whether the assured was so circumstanced in reference to this property that it could effect insurance for the benefit of itself and the interest of others in it. The fact is shown that defendant held the property for ¹³⁶ the purposes of repair and sale for the owner. It is well established that a bailee or agent holding property for the purpose of repair or of sale may insure it against loss or damage by fire for the protection of his special interest and that of the owner, and that this insurance may be taken in the name of such possessor, and in case of loss the avails of the policy may be applied in satisfaction of his claim against the property, and, if there is an amount above such claim, he holds it for the owner: *Strohn v. Hartford F. Ins. Co.*, 33 Wis. 648; *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606, 6 Am. Rep. 146; *Home Ins. Co. v. Baltimore W. Co.*, 93 U. S. 527, 23 L. ed.

368; Stillwell v. Staples, 19 N. Y. 401; Snow v. Carr, 61 Ala. 363, 32 Am. Rep. 3. Such insurance has commonly been supported upon the grounds that a person having a special interest in property for which he is responsible to the owner may protect himself in this manner, and, should he be unable to restore the property through loss by fire, he will thereby be assured of rendering its value to the owner to the extent of the indemnity. One of the requisites of such contracts is that it must appear from the contracts that the owner was within the contemplation of the parties when they made the contracts. This does not mean that each party must be ascertained when the policy issued, for it is presumed that the parties intended that the insurance provided for in the policy shall inure to the benefit of every person who assumes the relationship to the assured covered in the contracts, whenever a loss occurs to property covered by its terms. This presumption that every person assuming the specified relationship was within the intention of the terms of the policy is binding upon the insurer as well as the assured, and cannot be varied or contradicted unless it be shown that there was an understanding between the owner, the party effecting the insurance, and the insurer that such owner's interest was not to be included. But this can in no way affect the rights of other owners bearing the same relationship to the assured, when the terms of the contract include their interest. Neither ¹³⁷ is it essential to validate such a contract that the insurance fasten upon specific property, nor need the owner be known at the inception of the agreement, for the very object of such insurance is to meet the shifting exigencies of trade and commerce. The insurers are supposed to have intended that all persons assuming the relationship prescribed by the policy were within the protection of the agreement, if, when informed of its existence, they assent to and "adopted the acts of the agent and thus entitled themselves to all the advantages of the contract as fully as if originally made by their express authority": Stillwell v. Staples, 19 N. Y. 401; Bassett v. Hughes, 43 Wis. 319; McDowell v. Laev, 35 Wis. 171; Waring v. Indemnity F. Ins. Co., 45 N. Y. 606, 6 Am. Rep. 146. The right of such adoption and ratification continues while the contract is in force, and the fact that the loss has occurred has been held not to preclude the owner from exer-

cising it within a reasonable time thereafter: *Stillwell v. Staples*, 19 N. Y. 401; *Snow v. Carr*, 16 Ala. 363, 32 Am. Rep. 3; *Watkins v. Durand*, 1 Port. (Ala.) 251.

It is urged that, since plaintiff was not a party to the policies at their inception, they can be modified to express the intention of the original parties if they can show that the contracts do not embody the agreements actually made. This right, is, however, limited when third parties acquire an interest in the subject of the contracts, and the right no longer exists after the owner has sanctioned and adopted them, for the reason that he is no longer a stranger to the contracts, but, in legal effect, has become a party thereto, and thereafter the written contracts between the parties and those claiming under them cannot be contradicted, varied or modified by parol. As stated in *Minneapolis etc. R. Co. v. Home Ins. Co.*, 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390: "As to the rights which originate in the relationship established by the written contract, or are founded upon it, the rule against varying it applies": *Bassett v. Hughes*, 43 Wis. 319; *Libby v. Mt. Monadnock, M. S. & L. Co.*, 67 N. H. 587, 32 Atl. 772.

¹³⁸ It is further contended that the court erred in awarding plaintiff a recovery, because it appears that the whole amount paid is not sufficient to pay defendant's damage, as shown by its proof of loss. It has been shown above that the policies must be construed to be an insurance of all the stock held by the defendant, whether its own, or held by it for others, under the conditions expressed in the terms of the clause covering this property. From this it follows that whatever amount was paid by the insurance company to indemnify such damage and loss must be paid to the owners in such proportion as the value of the property of each bears to the whole amount paid, except that the defendant has the right to indemnify itself in full, to the extent of its interest or lien on the property, out of the amount due for the loss. In *Snow v. Carr*, 61 Ala. 363, 32 Am. Rep. 3, the court, speaking on this question, declares: "That the sum at which the policy was valued may have been less than the value of all the articles consumed does not destroy the right of any for whose benefit the insurance was effected to his proportion of the proceeds."

Many of the cases cited above sustain this apportionment and application of the avails of the insurance, and are corroborated by the following: *Siter v. Morris*, 13 Pa. St. 218; *Johnson v. Campbell*, 120 Mass. 449; *Boyd v. McKee*, 99 Va. 72, 37 S. E. 810; *Lucas v. London etc. Ins. Co.*, 23 W. Va. 258, 48 Am. Rep. 383.

The court found upon the evidence that the amount justly due plaintiff, as owner of the victoria, if defendant had included the damages to it (five hundred and thirty-seven dollars) in its proof of loss, amounted to three hundred and thirty-nine dollars and sixty-seven cents, but allowed nothing out of said sum to defendant in payment of the special interest or lien it had on the property, and which is found amounted to thirty dollars. Deducting this amount would leave a balance in plaintiff's favor in the sum of three hundred and nine dollars and sixty-seven cents. If we apply the foregoing proposition of law to the facts and circumstances of the case, namely, that defendant effected insurance of plaintiff's property, while in its custody and possession, for her; that plaintiff adopted ¹³⁹ the contracts, and so notified defendant and the insurance companies before the proofs of loss were made to it; that defendant refused to include plaintiff's property, and settled the loss and surrendered the policies without her consent—it follows that, under the relation between plaintiff and defendant, the insurance effected by defendant covered the property, defendant was to be indemnified to the extent of its interest, and whatever amount was due on the policies above this sum for this property belongs to plaintiff, as owner, and defendant should have collected it under the policies in its name, as trustee of an express trust, under section 2607 of the Statutes of 1898, as pointed out in *Strohn v. Hartford F. Ins. Co.*, 33 Wis. 648, and some of the New York cases cited above. We find nothing in the case of *Wunderlich v. Palatine F. Ins. Co.*, 104 Wis. 395, 80 N. W. 471, in any way conflicting with these conclusions; nor does the opinion of the court, in our view of its terms, declare that contracts of insurance like those in the instant case are not an insurance of the whole property for the protection of the interest of the assured and of the owner. In this view of the relationship of the parties, it is obvious that defendant violated a duty imposed by the contractual relation between it and

plaintiff; and, when it omitted to include plaintiff's property in making proof of loss under the policy, it became liable for the damage resulting from such default.

It is claimed that plaintiff's cause of action as stated in her amended complaint is one sounding in tort, instead of contract. We do not so interpret the facts alleged. The allegations contain all the facts setting forth the contractual relationship of the parties, defendant's fault in omitting to perform its obligation imposed thereby, and a consequent pecuniary injury to her. Allegations of fact that the defendant has collected the avails of the policies, and retains them as its own, do not alter the character of the complaint, under the facts above stated. We think the court properly allowed the amendment of the complaint.

¹⁴⁰ Error is assigned upon the ruling of the court sustaining an objection to the cross-examination of plaintiff's agent as to whether certain other insurance on complainant's barn covered this victoria. The record discloses nothing to indicate that this witness had testified on this subject in his direct examination, nor does it appear that any defense is pleaded to the effect that plaintiff's damage or loss was covered or paid her under any other policy than those involved in this case. Under these circumstances, the ruling was proper.

By the COURT. The judgment is modified by reducing the damages to the sum of three hundred and nine dollars and sixty-seven cents, with interest amounting to ninety-seven dollars and sixteen cents, together with the sum of forty-five dollars and sixty-three cents, costs and disbursements, amounting in all to the sum of four hundred and forty-two dollars and forty-six cents, and as so modified the judgment is affirmed; respondent to recover her costs on this appeal.

Winslow and Dodge, JJ., dissent.

Where a Fire Policy insures a stock of music and musical instruments, "his own or held in trust or on commission," and provides that goods held on storage must be separately and specifically insured, and the insured receives a piano from the owner to be forwarded to another city for repairs, the piano is covered by the policy to the extent of its value: Lucas v. Insurance Co., 23 W. Va. 258, 48 Am. Rep. 383. On the right of bailees generally to effect insurance on goods in their charge, see Lancaster Mills v. Merchants' etc. Co., 89 Tenn. 1, 24 Am. St. Rep. 586; Western etc. Pipe Lines v. Home Ins. Co., 145 Pa. St. 346, 27 Am. St. Rep. 703; Roberts v. Firemen's Ins. Co., 165 Pa. St. 55, 44 Am. St. Rep. 642.

One Who Effected Insurance covering his own goods and goods stored with him, and collected the insurance money, is liable to the owner of such stored goods for his share, although he did not request or know of the insurance: *Snow v. Carr*, 61 Ala. 363, 32 Am. Rep. 3.

THORP v. MINDEMAN.

[123 Wis. 149, 101 N. W. 417.]

CONTRACTS.—Construing Contemporaneous Instruments Together simply means, that if there is any provision in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated, and this does not mean that the provisions of one instrument are imported bodily into the other, contrary to the intent of the parties. (p. 1005.)

MORTGAGE NOTES—Negotiability—Collateral Agreements.—Although an ordinary negotiable note, accompanied by an ordinary real estate mortgage with the ordinary covenants to pay taxes, and to maintain insurance, and that in case of failure to pay interest, taxes, or insurance, the principal sum shall, at the option of the mortgagee, become due without notice, form two separate instruments and are parts of the same transaction, yet each relates to its own subject matter and does not interfere with the other. The covenants and conditions in the mortgage are simply agreements for the preservation of the security, not intended or fitted to qualify or affect in any way the absolute promises contained in the mortgage note, and do not enter into or change it in the least, nor affect its negotiability. (p. 1008.)

MORTGAGE NOTES—Negotiability.—An ordinary note secured by a real estate mortgage is negotiable, although it provides that upon default in the payment of interest, or failure to comply with any conditions of the mortgage, the whole principal shall, at the option of the mortgagee, become due and payable. (p. 1011.)

BILLS AND NOTES—Indorsement as Affecting Negotiability. If a negotiable note is indorsed "For value received I hereby sell, transfer, and assign the within note without recourse," such indorsement and the addition of the words "without recourse" do not impair the negotiability of the note. (p. 1011.)

MORTGAGES—Foreclosure—Receivership.—If, on a mortgage foreclosure, there is ample showing justifying the appointment of a receiver with power to collect rents, the mortgagor cannot complain of the inclusion in the receivership of a part of the premises on which rent has been paid in advance for more than the period of redemption. (p. 1013.)

C. J. Weaver, for the appellants.

T. L. Kennan, for the respondent.

¹⁵² WINSLOW, J. The important question in this case is whether the note in suit is negotiable. The appellants argue ¹⁵³ that the note and mortgage must be construed together as one contract; that, so construed, the note requires the performance of other acts besides the payment of money, and is rendered uncertain both as to amount and time of payment, and hence is non-negotiable. The general rule that agreements contemporaneously executed and pertaining to the same subject matter are to be construed together is so familiar and so frequently acted upon that it needs only to be stated. The question how far, if at all, this rule imports into a promissory note the collateral agreements contained in an accompanying mortgage is the question to be considered in this case. The collateral agreements contained in the mortgage, which the appellants claim are imported into the note and destroy its negotiability, are: 1. The agreement that, in case of failure by the mortgagor to insure the buildings in the mortgagee's favor in approved insurance companies, the mortgagee may insure the same, and the premiums paid shall be a lien on the premises "added to" the amount of the note; and 2. The agreement that in case of failure to so insure, or to pay interest or taxes when due, or to deliver or exhibit tax receipts showing the payment of the taxes, then the whole principal shall become due at the mortgagee's option, and without notice. It will be observed that the only one of these agreements which the note contains in terms is the agreement that the principal shall become due without notice, at the option of the mortgagee, upon failure to pay interest or comply with any of the other conditions of the mortgage; but the argument is, in effect, that all of the collateral agreements in the mortgage have become a part of the note by virtue of the legal principle just stated. This is a decidedly revolutionary proposition. If it be true, both the business world and the courts have been sadly in error for many years. This court held at an early day that a note negotiable on its face retained its negotiable character notwithstanding it was secured by a mortgage upon real estate, and, when transferred before due, ¹⁵⁴ carried the mortgage with it relieved of all equities (*Croft v. Bunster*, 9 Wis. 503); and that the words "secured by real estate mortgage" upon the face of the note were not sufficient to charge the assignee with notice of any defense, nor of the terms of mortgage: *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *Boyle v. Lybrand*,

113 Wis. 79, 88 N. W. 904. If all the agreements contained in every mortgage are, as matter of law, imported into the note, these propositions could not be true, for the general rule (except as changed by statute) is that negotiable instruments cannot be bound up and fettered with collateral agreements for the doing of other things besides the payment of money, and retain their negotiable character. Upon the principle contended for, the most simple real estate mortgage would deprive the note which it secures of its negotiable character, because it would import into the note one or more collateral agreements which are not for the payment of money. Fortunately it is not necessary to give so violent a shock to the well-understood principles of law governing the negotiability of notes and mortgages. The appellants' contention really results from a confusion of ideas. They lay down the well-understood proposition that contemporaneous instruments relating to the same subject matter are to be construed together, and conclude that it follows that a note and mortgage, though separately executed, are one instrument, and that the note is that instrument. The rule that instruments are to be construed together does not lead to this result. Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate ¹⁵⁵ instruments, and to provide for entirely different things, as in the very case before us. The note is given as evidence of the debt and to fix the terms and time of payment. It is usually complete in itself—a single, absolute obligation. The purpose of the mortgage is simply to pledge certain property as security for the payment of the note. The agreements which it contains ordinarily have no bearing on the absolute engagements of the note, but simply relate to the preservation of the security given by its terms, such as the payment of taxes, the insurance of houses, and the like. While the two instruments will be construed together whenever the question as to the nature of the actual transaction becomes material, this does not mean that the mortgage

becomes incorporated into the note, nor that the collateral agreements to pay the taxes, or to insure the property, or that the mortgagee might insure in case of default by the mortgagor and have an additional lien therefor, become parts of the note. These agreements pertain to another subject, namely, the preservation intact of the mortgaged property. The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may discard the mortgage entirely, and sue and recover on his note; and the fact that a mortgage had been given with the note, containing all manner of agreements relating simply to the preservation of the security, would cut no figure. A pleading alleging such facts would be stricken out as frivolous or irrelevant.

This idea is well expressed in the case of *Garnett v. Myers* (Neb.), 94 N. W. 803, where it is said: "If the terms and conditions of the mortgage are limited to the proper province of the mortgage—that is, to provide security for the indebtedness—its provisions relating solely ¹⁵⁶ to the security will not affect the negotiability of the note. If the holder of the note is compelled to pay the taxes or insurance on the mortgaged property to protect the security, and is afterward allowed to recover the amount so paid in addition to the principal indebtedness, this does not affect the amount of the indebtedness itself."

It may be added to this that provisions to that effect in the mortgage do not affect at all the absolute character of the promise to pay contained in the note, and hence do not affect its negotiability. A very interesting and instructive discussion of this question will be found in the opinion in the case of *Frost v. Fisher*, 13 Colo. App. 322, 58 Pac. 872, where the same conclusion is reached.

The propositions so far laid down seem incontrovertible if the principle is to be maintained that a note negotiable in form remains negotiable notwithstanding it is secured by an ordinary real estate mortgage. As might be expected, we are referred to no authorities which really take issue with that principle, or squarely hold that the agreements of every mortgage are imported into the accompanying note. The nearest

approach to such a holding, perhaps, is the case of *Noell v. Gaines*, 68 Mo. 649, where a provision in a deed of trust as to the time of payment of the debt was held to control the terms of the note in the hands of a purchaser with notice. A very vigorous and persuasive dissenting opinion was filed in this case, which forms instructive reading on this very question; but, in any event, the case does not reach the proposition that agreements in a mortgage, simply relating to the preservation of the security, are ever to be considered as imported into the note. Starting from the fundamental proposition that the ordinary negotiable note, accompanied by the ordinary real estate mortgage with the ordinary covenants to pay taxes, etc., form two separate contracts, both being a part of the same transaction, but each relating to its own subject matter and not interfering with the other, just as a building ¹⁵⁷ contract and a bond to secure its performance are separate and distinct, let us consider in what respect, if any, the note and mortgage in this case differ from the ordinary note and mortgage.

As will be seen by reference to the papers themselves, the mortgage contains conditions requiring the payment of taxes on the premises by the mortgagor; the exhibition of the receipts therefor to the mortgagee; the maintenance of insurance on the buildings in approved companies, with the right to the mortgagee to insure in case of failure of the mortgagor, the expense to be a lien on the premises "added to the amount" of the note; also a provision that in case of failure to pay interest, taxes, or insurance, or to exhibit the tax receipts, the principal sum shall, at the option of the mortgagee, become due without notice. Turning to the note, we find that it provides that, if default is made in payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage, then the principal shall become due, at the option of the mortgagee, without notice. It will be noticed at once that none of the collateral agreements of the mortgage are in terms imported into the note except the agreement that the principal shall become due, at the mortgagee's option, in case of failure to perform any of the agreements of the mortgage. It will be noticed also that the other collateral agreements contained in the mortgage are simply agreements providing for the due preservation of the mortgage security, and not affecting in any way either the time of payment or the amount of the note.

These agreements are the agreement to pay the taxes and exhibit the receipts, the agreement to effect and maintain insurance on the buildings for the mortgagee's benefit, and the agreement that the mortgagee may insure in case of default, and have a lien on the premises "added" to the note for the premiums paid. There was, indeed, a claim made that the agreement that the premiums paid should constitute a lien¹⁵⁸ added to the note meant that the note was to be increased by the amount paid, so that the amount of the note was thereby rendered uncertain; but we think it plain that the clause simply provides for the acquiring of a lien upon the premises in addition to the lien of the note. This meaning seems so obvious to us that we will spend no more time upon the suggestion.

These last-named collateral agreements, then, being simply proper agreements for the preservation of the security, and not intended nor fitted to qualify or affect in any way the absolute promises of the note, do not, upon the principles hereinbefore laid down, enter into or change the note in the least, nor affect its negotiability. Such being the case, we have only to consider the question whether the agreement that the whole principal of the note shall be due at the mortgagee's option in case of a failure to pay interest or perform any of the conditions of the mortgage renders the note non-negotiable. Upon this question appellant places reliance upon the cases of *Continental Nat. Bank v. McGeoch*, 73 Wis. 332, 41 N. W. 409, and *Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100. In the first of these cases, an agreement inserted in the note, providing that the payee might sell collateral securities at any time if they declined in value, and apply the proceeds, less expense of sale, on the debt, and the balance should forthwith become due, was held to make the note uncertain as to amount and time of payment, and hence non-negotiable. In the *Kimball* case, an agreement that, in case of failure to pay any installment, or of any attempt to dispose of or remove the chattel for which the note was given, the holder might declare the whole amount due, and collect same by suit or sale of the property, and, if there was a deficiency after sale, it should be payable on demand, was held to make both amount and time of payment uncertain, and hence make the note non-negotiable. It must be admitted that both of these cases have a strong tendency to support the¹⁵⁹ position of the appellants upon

the proposition that the time of payment is rendered uncertain by the agreement before us. Especially is this true of the Kimball case. In that case the uncertainty as to time resulted from the fact that, in case the giver of the note failed to pay an installment, or attempted to dispose of or remove the property sold, the holder might at once collect the whole. In the present case the agreement is that in case of failure to pay interest or keep taxes and insurance paid the holder may at once collect the whole. In both cases the contingency depends upon the acts or omissions of the maker of the note.

We should find it quite hard, if not impossible, to differentiate the two cases were it not for the provisions of the negotiable instruments law (Laws 1899, c. 356), which was passed since the decisions cited, and prior to the giving of the note in question. This law gives the general requirements of negotiable paper in section 1675—1, among which are the following: "1. It must be in writing, signed by the maker or drawer; 2. Must contain an unconditional promise or order to pay a sum certain in money; 3. Must be payable on demand or at a fixed or determinable future time."

The law then provides, in section 1675—2, that the sum is certain within the meaning of the law, though it is to be paid "(3) by stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due." The law further provides, in section 1675—4, that an instrument is payable at a determinable future time, within the meaning of the law, which is payable "(4) at a fixed period after date or sight, though payable before then on a contingency." These two provisions seem to cover this whole case, and leave really nothing to discuss. This note is payable at a fixed period after date, but may be made payable before that time upon the happening of certain contingencies which are within control of the maker. The latter ¹⁶⁰ clause quoted would seem to have been added to meet just such cases as the present. Such agreements as we have here are of very frequent occurrence, and it was evidently the purpose to provide for them.

The case of Wisconsin Yearly Meeting v. Babler, 115 Wis. 289, 91 N. W. 678, is also somewhat relied on by appellants, but it evidently has no bearing on the case. In that case it was held that a clause in a note authorizing the confession of judgment at any time, whether due or not, rendered the note

non-negotiable, because the time of payment depended entirely on the whim or caprice of the maker. As an additional reason for the ruling, the fact that the negotiable instruments law allows the insertion of a clause authorizing a confession of judgment if not paid at maturity was also referred to.

While we have considered this question as absolutely settled by the negotiable instruments law, it must not be supposed that we have failed to examine and carefully consider the numerous cases cited by the appellants, mostly from western courts, as having some bearing upon this question. We have been unable to find that any of these cases really conflict with the general proposition laid down in the beginning, namely, the proposition that the ordinary provisions of a real estate mortgage requiring payment of taxes and other acts by the mortgagor for the preservation of the mortgaged property are not imported into the accompanying note simply because the papers are simultaneously executed as a part of the same transaction. A number of them are cases decided by the Kansas court of appeals, and are, in substance, to the effect that, where a bond or note in terms refers to the mortgage, and declares it to be "a part of this contract," and the mortgage contains covenants to pay taxes, insure, keep buildings in repair, and the like, and that the entire sum shall become due in case of default in any of such agreements, this renders the bond or note non-negotiable. Such are the cases of *Lockrow v. Cline*, 4 Kan. App. 716, 46 Pac. 720, *Chapman v. ¹⁶¹Steiner*, 5 Kan. App. 326, 48 Pac. 607, and *Wistrand v. Parker*, 7 Kan. App. 562, 52 Pac. 59. It goes without saying that such cases have no bearing on the present case, because here there is no clause in the note making the mortgage a part thereof, or adopting its provisions, except the provision authorizing the whole amount to be declared due upon certain contingencies.

Another line of cases, from Nebraska, holds that where a mortgage provides that the mortgagor shall pay the taxes levied on the mortgagee for or on account of the mortgage, this agreement destroys the negotiability of the note, because it renders the amount uncertain: *Garnett v. Meyers* (Neb.), 94 N. W. 803; *Consterdine v. Moore* (Neb.), 96 N. W. 1021; *Allen v. Dunn* (Neb.), 99 N. W. 680. Such seems also to be the effect of the case of *Brooke v. Struthers*, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536. Without stopping to consider whether these decisions should be approved or not, it

is enough to say that they are not at all in conflict with the present decision. The agreement to pay taxes was to pay taxes which might be levied on the mortgagee, not the taxes on the mortgaged property; hence the agreement had no connection with the preservation of the security, and was construed by the courts as an agreement to pay an indefinite sum as a part of the note.

In the cases of *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779, and *Gilbert v. Nelson*, 5 Kan. App. 528, 48 Pac. 207, notes containing stipulations very similar to those found in the present case are pronounced non-negotiable upon what seems to us very unsatisfactory reasoning, which we feel no inclination to follow, especially in view of the positive provisions of our negotiable instruments law before cited.

The cases of *Dilley v. Van Wie*, 6 Wis. 209, and *Elmore v. Hoffman*, 6 Wis. 68, are also cited as sustaining appellants' contention, but it is evident that they do not. In the *Dilley* case the note contained an express clause subjecting it to the provisions of another agreement, made on the same day, ¹⁶² by which it appeared that the payment was subject to certain equities between the parties. The clause was rightly held to deprive the paper of its negotiable character. In the *Elmore* case it was held that a collateral agreement made between the parties contemporaneously with a note, by which the payee agreed to give day of payment on the note till the happening of a certain named contingency, was admissible in evidence to defeat an action on the note in the hands of one who purchased the note with notice of the contemporaneous agreement. We hold, therefore, that under the present negotiable instruments law the note in the present case is negotiable, and in so holding it is evident that the cases of *Continental Nat. Bank v. McGeoch*, 73 Wis. 332, 41 N. W. 409, and *Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100, are overruled so far, at least, as they hold that such agreements create an uncertainty in the time of payment.

The next contention made by the appellants is that the written transfer of the note was not a commercial indorsement, but a mere assignment, and hence that the transferee took it subject to all equities. We think this contention cannot be sustained. The addition of the words "without recourse" does not impair the negotiable character of the instrument: Laws 1899, c. 356, sec. 1676-8. While there is doubtless some authority tending to support appellants'

claim, we think that there can be no doubt that the transfer in the present case must be held to be a commercial indorsement under the decisions of this court in the cases of *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720; *Bange v. Fline*, 25 Wis. 544; *Murphy v. Dunning*, 30 Wis. 296. In all of these cases a negotiable note was transferred by attaching it to a negotiable bond which recited that the note was thereby "assigned and transferred" to the holder of the bond as security for the payment of the bond, there being no indorsement on the note itself; and this was held an indorsement within the law-merchant. Here there is an agreement on the back of the note itself, ¹⁶³ signed by the payee, by which he sells, assigns and transfers the note to the plaintiff. The intent to pass title and make the note transferable by indorsement and delivery afterward seems very plain. Such, also, seems to be the current of authority: 1 *Daniel on Negotiable Instruments*, 5th ed., sec. 688c.

But it is argued that the evidence shows that the plaintiff made Herman her agent in buying the note and mortgage, and that Herman's knowledge was consequently her knowledge. There is really nothing in the evidence which substantiates this claim. The plaintiff was the only witness on the subject, and she testified that she purchased the mortgage of Herman herself, and paid the full principal sum therefor; that she went to his office for the purpose of buying mortgages, and told him she had some money to invest, and purchased this mortgage of him; that she looked at a number, and he read over several he had for sale; that he said they were first mortgages, and she took his word for what they were, and trusted his judgment. There is nothing to show that Herman was at any time plaintiff's agent, or had her money to invest, or that the transaction was anything but a purchase by the plaintiff and a sale by Herman. True, she says that she presumed Herman was acting for her, and that she took his judgment in the matter, but these statements are clearly merely the expression of the idea that she was relying on his statements that the mortgages were first mortgages, and desirable securities to purchase.

After judgment was entered upon affidavits showing that the premises were inadequate security for the loan, and were in need of repair, the court appointed a receiver, with power to collect rents, etc. The defendants Mindeman and wife appeal from this order "in so far as said order and from that

part of said order, which applies to the lower flat of said building on said premises." It appeared by affidavit that the lower flat of the building was in possession of a tenant, who had paid rent in advance for more than the period of redemption, ¹⁶⁴ and it is urged that the receiver could collect nothing of him, and hence that this part of the premises should have been omitted in the order. We are unable to see any merit in this appeal. If there are vested rights in this tenant, doubtless he can protect them, and protect them equally well however the order appointing a receiver runs. Nor does the inclusion of the lower flat affect the defendant Mindeman in the least, because the rent has been paid to him according to the affidavit. There was an ample showing justifying the appointment of the receiver.

By the COURT. Judgment and order appealed from affirmed.

The Negotiability of a Promissory Note as affected by provisions in the mortgage given to secure it is discussed in the recent cases of Consterdine v. Moore, 65 Neb. 291, 101 Am. St. Rep. 620, and note; Kendall v. Selby, 66 Neb. 60, 103 Am. St. Rep. 697; Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598; and see the cases cited in the cross-reference note thereto. According to Kendall v. Selby, 66 Neb. 60, 103 Am. St. Rep. 697, if the terms of a note make the mortgage securing it a part of the note, a provision in the mortgage that on a failure to comply with any of its conditions the whole debt shall become due and payable, does not affect the negotiability of the note. See, too, Clark v. Skeen, 61 Kan. 526, 78 Am. St. Rep. 337, and cases cited in the cross-reference note thereto, where it is held that a note is negotiable, although it stipulates that on default in the payment of interest the whole amount shall become due at the option of the holder and then draw a greater rate of interest.

HUTCHINS v. BAUTCH.

[123 Wis. 394, 101 N. W. 671.]

MECHANICS' LIENS—Definiteness of Contract.—It is not essential to a mechanic's lien that the contract for furnishing the labor or material should be so definite as to enable the one personally liable to the lien claimant, or the owner or person interested in the building to determine precisely the contract price for such labor or material or the details of the work. It is sufficient as to any work or material furnished that it is in fact included in the contract. (p. 1015.)

MECHANICS' LIENS—Time for Filing.—If the time for filing a mechanic's lien claim is limited to six months subsequent to the last charge for furnishing material or work, such time as to all work or material furnished under one contract, regardless of the time occupied in the execution thereof, commences at the date when the last labor or material is furnished. (p. 1015.)

MECHANICS' LIENS—Continuity of Work.—There must be some visible commencement of work to fix the time of the commencement of a mechanic's lien claim, but there need not be a visible continuity of work, in order that the last labor or material furnished may relate back to the beginning of the work, and all be regarded as furnished under one contract. (p. 1016.)

MECHANICS' LIENS—Unreasonable Delay—Estoppel.—Such delay in completing lienable contract work as to indicate full performance, or abandonment of the work, so clearly as to render failure to make inquiry in respect to the matter excusable, is binding upon the mechanic's lien claimant upon principles of estoppel in pais. (p. 1016.)

MECHANICS' LIEN—Sale of Land Pending Work under Contract—Offer to Perform.—If one sells his land while mechanic's lienable work is in progress thereon under a contract, the license incident to the contract to enter upon the premises may be terminated by the new owner, but he cannot by any mere act of his defeat the lien remedy of the contractor for work already done, and if he refuses to allow completion of the contract, an offer to do so on the part of the contractor is equivalent to performance as regards the commencement of the time limited for filing the lien petition for work and material already furnished. (pp. 1016, 1017.)

R. S. Cowie and Winter & Esch, for the appellant.

Anderson & Ekern, for the respondents.

396 MARSHALL, J. The ultimate question for solution in this case is, Under the circumstances, were respondents entitled to a lien under chapter 143 of the Statutes of 1898, the person they dealt with having, more than six months after their contract was, as regards appearances to third parties, performed, conveyed her interest in the land to appellant? The errors assigned, in the main, are that the trial court improperly held that the contract included the

work of putting on the frost-proof cock; that putting it on after the apparent completion of the work, as regards third parties, extended the time for filing the lien petition; that an entry on the premises to complete the work after the sale to plaintiff, without his permission, could affect the right of lien; and that the delay of one year in putting on the frost-proof cock was according to custom, or was reasonable.

On all questions of fact involved in the assignments of error the evidence, as we find it in the record, is so conflicting that under familiar rules the trial court's findings cannot properly be disturbed.

Counsel argue that the contract was so indefinite that, as a matter of law, the putting in of the frost-proof cock should not be deemed to be included therein. On that reference is made by counsel to decisions elsewhere. There is nothing in our statutes suggesting as an essential to a lien on realty, as to third parties, that the terms of the contract must be so precise that the amount agreed to be paid for work and material furnished thereunder can be definitely determined therefrom. The rule in Massachusetts, which counsel invoke, does not apply to our statutes. They in unequivocal terms provide that every person, who as principal contractor furnishes work or material in specified cases, including such as the one before us, used in the improvement of realty so as to become a part thereof, is entitled to a lien for the indebtedness created thereby upon all the right, title and interest in such realty of the person contracted with at the time of the commencement ³⁹⁷ of such work; or for the furnishing of such material. Neither the contract price for the work and material, nor the precise details of such work are required by the statutes, expressly or by implication, to be fixed in advance. It is sufficient as to any work or material that it be in fact included in the contract. The time for filing the lien petition is limited to six months subsequent to the last charge for furnishing material or work: Stats. 1898, sec. 3318. That, as to all furnished under one contract, regardless of the time occupied in the execution thereof, commences at the date of the last thereof: *Fowler v. Bailey*, 14 Wis. 125. That case indicates clearly that mere lapse of time between the last act and those preceding it in the execution of a contract is immaterial.

In support of the point that omission to furnish some unimportant part of contract work, or material, till a considerable period after the contract has been apparently fully performed cannot extend the time for filing the lien petition. *Chapman v. Wadleigh*, 33 Wis. 267, is referred to. That case is to the effect that the language of section 3314 of the Statutes of 1898, providing that the lien shall have priority over any other lien originating subsequent to the commencement of the construction, repair, etc., calls for visible physical acts in that regard, likely to give notice to third parties dealing in respect to the realty and put them on inquiry. It has no reference to necessity for visible continuity of work from the commencement thereof to the beginning of the period limited for filing the lien. *Fish Creek B. & L. D. Co. v. First Nat. Bank*, 80 Wis. 630, 50 N. W. 585, cited by counsel, relates to the log lien statute, which expressly requires continuity of work. *Berry v. Turner*, 45 Wis. 105, also cited, is to the effect that work done after completion of a contract, pursuant to a settlement for breach thereof does not count in determining the time within which the lien may be filed for indebtedness accruing under the contract. Numerous ³⁹⁸ other cases are cited to our attention, all of which have been examined. We fail to discover that any of them more closely bear on the question in hand than those specially referred to. Doubtless, such delay in completing a contract as to indicate either full performance, or abandonment of the work, so clearly as to render failure to make inquiries in respect to the matter excusable, would be binding on the lien claimant upon principles of estoppel in pais. The trial court found here that there was no unreasonable delay, and we do not see our way clear to disturb that decision.

It seems that counsel are in error in their position that the trial court decided that a lien can be acquired, or the time for filing a lien petition extended, by the commission of a trespass. When the last act under the contract was performed the person respondents contracted with was still in possession of the premises, and so far as we can discover, neither she nor anyone else prohibited them from completing their work. The trial court, doubtless, found that there was no such prohibition, and that if it were otherwise, their willingness to complete their work was suffi-

cient to save their right of lien for work already done. It may be that if one sell land while lienable work is in progress thereon under a contract, the license incident to the contract to enter upon the premises might be terminated by the new owner, but he could not by any mere act of his defeat the lien remedy of the contractor for work already done. If he refused to allow completion of the contract, an offer to do so would be equivalent to performance, as regards the commencement of the time limited by law for filing the lien petition for work and material already furnished. Otherwise the remedy under the lien statute might in many cases be defeated by sale of the realty pending the execution of a contract to do lienable work thereon.

There are no other questions suggested for consideration deemed to be of sufficient importance to call for special treatment.

By the COURT. The judgment is affirmed.

For Authorities Bearing upon the Decision in the principal case, see the note to Goodman v. Baerlocher, 43 Am. St. Rep. 900; Fitzgerald v. Walsh, 107 Wis. 92, 81 Am. St. Rep. 824; Baker v. Waldron, 92 Me. 17, 69 Am. St. Rep. 483.

PIETSCH v. MILBRATH.

[123 Wis. 647, 101 N. W. 388, 102 N. W. 342.]

RES JUDICATA—Sufficiency of Complaint.—If the supreme court has held on two former occasions that the facts alleged in a complaint constitute a good cause of action in favor of a corporation against the defendants, enforceable at the suit of plaintiffs as stockholders to recover of the defendants the profits obtained in buying land at one price and selling it to the corporation at another, the sufficiency of the complaint to support a judgment is *res judicata*. (p. 1019.)

CORPORATIONS.—Promoters cannot Secretly Obtain Profits from the corporation they cause to be organized and launched into the business world, without being responsible to it therefor. (p. 1022.)

CORPORATIONS.—Persons Who Act as Promoters of a corporation do not necessarily cease to be such when the corporation is organized to do business, and they may retain their fiduciary relation thereto until its capital stock shall have been taken and the corporation provided with a board of directors, or some reasonably efficient

means of protecting its interests, and so long as there are prospective original subscribers for stock and the promoters and those concerting with them remain in control of the corporation, it is in a situation to be deceived, and the promoters retain their fiduciary relation thereto (p. 1023.)

CORPORATIONS—Promoters.—If a corporation has been organized and persons promoting it up to that time continue to act for it by inducing persons to come in and subscribe for its capital stock, their relation as promoters continue. (p. 1023.)

CORPORATIONS—Promoters—Liability.—If one or more persons acquire property intending to promote the organization of a corporation to purchase it from them at a profit to themselves, and effect such purpose, limiting the membership to interested parties until the transaction is completed between them and the corporation, intending thereafter to cause the balance of the capital stock to be sold to outsiders who are kept in ignorance of the true nature of the transaction, and they effect such intent, they are guilty of actionable fraud upon the corporation and liable to it for the gains made. (p. 1024.)

CORPORATIONS—Promoters—Liability.—All who are concerned in a transaction of buying land at one price to turn it over to a corporation to be formed at a much greater price, and to induce others to come into the corporation in ignorance of the facts, and contributing the actual capital necessary to enable them to fully accomplish their purpose, become liable to refund their profits to the corporation. (p. 1024.)

CORPORATIONS—Promoters—Statute of Limitations.—A corporation has a remedy at law to enforce the liability of its promoters to refund to it their unlawful profits, and therefore the statute of limitations runs against the cause of action both of the corporation and that of its stockholders. (p. 1025.)

CORPORATIONS—Promoters—Fraud—Statute of Limitations. Except in an action for relief on the ground of fraud in a case cognizable solely in a court of equity, the running of the statute of limitations is not postponed until the discovery by the aggrieved party of the fraud, and the cause of action by a corporation against its promoters to recover unlawful profits obtained by them is not solely cognizable in a court of equity, there being an adequate remedy at law. (p. 1025.)

LIMITATION OF ACTIONS.—Ignorance of His Rights on the part of the person against whom the statute of limitations has commenced to run will not suspend its operation. (p. 1026.)

LIMITATION OF ACTIONS.—Concealed fraud will not postpone the running of the statute of limitations respecting a cause of action at law. (p. 1031.)

COSTS will be Awarded to Defendant when in an equity action he prevails as to the entire cause of action set forth in the complaint. (p. 1035.)

Quarles, Spence & Quarles, J. E. Roehr and Timlin & Glicksman, for the appellants.

G. L. Williams and Bohmrich & Williams, for the respondents.

⁶⁵² MARSHALL, J. As indicated in the statement, this court has twice held in this case that by rules in previous decisions made here the circumstances alleged to have occurred constitute a good cause of action in favor of the corporation against the defendants, enforceable at the suit of the plaintiffs as stockholders, to recover of the former the profits obtained in buying the land at one price and selling it to the corporation at another. The cases where the controlling principles have been proclaimed and applied are numerous, the most significant being *Pittsburg M. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259; *Fountain S. P. Co. v. Roberts*, 92 Wis. 345, 53 Am. St. Rep. 917, 66 N. W. 399; *Franey v. Warner*, 96 Wis. 222, 71 N. W. 81; *Hebgen v. Koeffler*, 97 Wis. 313, 72 N. W. 745; *Milwaukee C. S. Co. v. Dexter*, 99 Wis. 214, 74 N. W. 967, 40 L. R. A. 837; *Zinc C. Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 825, 79 N. W. 229; *Spaulding v. North* ⁶⁵³ *Milwaukee T. S. Co.*, 106 Wis. 481, 81 N. W. 1064; *Forest Land Co. v. Bjorkquist*, 110 Wis. 547, 86 N. W. 183. It follows that the sufficiency of the complaint to support a judgment is *res judicata*: *Case v. Hoffman*, 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L. R. A. 728.

While, as counsel for appellants claim, the findings are indefinite, being so framed at some points that they might be taken one way or another, they follow the complaint in that regard. Why this indefiniteness, we need not go far to discover. A misunderstanding by counsel of language used in *Spaulding v. North Milwaukee T. S. Co.*, 106 Wis. 481, 81 N. W. 1064, or inability of counsel to satisfactorily gather the purport thereof is very plainly portrayed in both complaint and findings. It is probable the learned trial court allowed counsel to phrase the decision as it appears in the records, and if it were not for that which, though sanctioned by practice, in the judgment of the writer, cannot be too strongly condemned—if the court had responded fully to the commands of the statute to state in writing its decision, instead of permitting the stating thereof to be done by one viewing the case from a one-sided standpoint—the uncertainty complained of would not exist, and we would not have before us a decision as to facts, under any circumstances requiring careful consideration to

determine its meaning in advance of pronouncing the legal effect thereof.

It is of course conceded that if the findings will reasonably admit of a construction harmonizing with and responding to the allegations of the complaint, as it was viewed here on the former occasion, on their face they will support the judgment. The view that we take of this case renders unnecessary any examination in detail of the numerous criticisms of the findings made by appellants' counsel, or deficiencies therein suggested.

It must be conceded that the following situation is well within the language of the complaint and the language of the findings, as well as supported by the evidence. Those against ⁶⁵⁴ whom the judgment was rendered were parties to a plan to obtain control of certain real estate with a view of turning the same over to a corporation to be formed, at a large profit to themselves, without the stockholders therein, other than themselves, having knowledge of their obtaining such advantage. The plan was executed by the formation of defendant corporation and conveyances of land to it for one hundred and sixteen thousand dollars, when the expenditure to acquire such land was about one-half thereof, and taking fourteen hundred and seventy-two shares of the capital stock of the corporation, of the par value of one hundred and forty-seven thousand two hundred dollars, ostensibly at thirty-four dollars per share, to be contributed in cash to the corporation, without such contribution being made in fact; the setting aside of five hundred and sixty-two shares of stock to be sold by the corporation to outsiders at thirty-four dollars per share cash, through the efforts of members of the combine, the purchasers understanding that a like sum had been, or was to be, contributed to the corporate treasury for each share of the corporate stock; the doing of all those things at a time when only members of the combine interested in making the profits aforesaid were members of the corporation; the completion of the plan thereafter by the sale of the five hundred and sixty-two shares of stock at thirty-four dollars per share, the plaintiffs being the victims and furnishing substantially all of the capital of the corporation. The legal effect of such facts, as we shall see, is sufficient to support the judgment, unless defendants are entitled to recover on their plea of the statute of limitations.

True, the complaint is so framed as to suggest that some, at least, of the plaintiffs were stockholders at the time the corporation was organized and the land conveyed to it, and were not then deceived as to the real nature of the transaction; true, the findings are so drawn as to suggest the same thing; and true, the evidence shows clearly that none of the plaintiffs were members of the corporation when the transaction occurred between it and the promoters whereby they obtained, substantially without consideration, fourteen hundred and seventy-two shares of its stock; that when the corporate proceedings were had respecting the ~~655~~ land everyone then a member of the corporation was fully advised as to the nature thereof; that the only deception practiced on defendants was by inducing them to take the stock of the corporation at thirty-four dollars cash per share, believing all the subscribers or takers of stock were to contribute likewise therefor; and if it be the law that if no one was literally, at the time the transaction between the promoters and the corporation occurred, deceived, then no complaint can be made by or in the name of the corporation against the defendants, no cause of action was established by the evidence unless that question is foreclosed by the decision made when the complaint was challenged on demurrer.

Counsel for appellants contend that the contingency above suggested as to the law is ruled in their favor by *Spaulding v. North Milwaukee T. S. Co.*, 106 Wis. 481, 81 N. W. 1604; that every member of the corporation, as matters stood when the land was transferred to it and the promoters came into possession of the profits sought to be regained, was fully advised in respect thereto; that no one was then deceived, so the prime essential of a cause of action in favor of the corporation is wanting; that if, after the consummation of the deal between the promoters and the corporation, deception was practiced by any defendant, inducing any plaintiff to take stock, supposing he was obtaining it on the same terms as the promoters, it is personal to himself. Those views are based on this language used in that case: "The liability of promoters of a corporation is predicated on fraud, the essential element of which is deceit. It does not matter that the corporation received property at a higher price than it cost the promoter, to give the corporation a right to rescind or recover back

profits made. It must have been deceived into paying such price or the corporation cannot be deceived, save as some of the individuals composing it are."

No serious fault can be found with that. Generally speaking, it is correct. It was used as regards a situation where all the stock of a corporation had been taken. Certainly the ⁶⁵⁶ court did not intend to hold that a corporation has not capacity to acquire a cause of action to recover profits made by its agents, acting in the double role of such agents and at the same time for themselves and to their own advantage, no one standing by to protect it; that they can perfect the corporate organization, keep control thereof for their own gain while ostensibly promoting its interests; that they can restrict subscriptions to stock to a part taken by themselves in order that their ulterior purpose may be accomplished; that while so in control for such purpose, ostensibly acting for the corporation but really for themselves, they may make the organization a mere secret conduit through which to convert the money paid by future subscribers to stock to their own gain and then use the corporate organization to aid in luring such subscribers into the trap, the corporation being powerless to prevent it—and yet the law furnish it no remedy for the wrong. To establish such a doctrine would be to open a most inviting avenue for the commission of fraud. Then the well-settled doctrine that promoters cannot secretly obtain profits from the corporation they cause to be organized and launched into the business world without being responsible to it therefor can be easily evaded by their organizing the corporation, taking part of the stock ostensibly at the full par value thereof in cash, but really paying little or nothing therefor, and then inducing others to take the balance of the stock in ignorance of the facts, paying the full par value therefor into the corporate treasury.

The law does not permit any such transaction as the one above suggested to go necessarily unredressed. Persons who act as promoters of a corporation do not necessarily cease to be such when the corporation is organized to do business. They may retain their fiduciary relation thereto till its share capital shall have been taken and the corporation provided with a board, or some reasonably efficient means of protecting its interests. So long as there are

prospective original subscribers ⁶⁵⁷ for stock and the **promoters** and those concerting with them remain in control of the corporation, it is in a situation to be deceived, within the rule of the Spaulding case. It is deceived in a legal sense when it is rendered helpless by its managers as to protecting those invited to subscribe for its stock, and is then used to aid in defrauding them. It is deceived thereby just as effectually as regards necessity for, and means of, redress as in a case where promoters by control of a corporation cause it to deal with them to their special advantage over then existing and unsuspecting members thereof.

The foregoing will be found well supported in authorities. If a corporation has been organized and persons promoting it up to that time continue to act for it by inducing persons to come in and subscribe for its capital stock, their relations as promoters continue: Alger on Law of Promoters, sec. 20. In the leading English case of *Erlanger v. New Sombrero P. Co.*, L. R. 3 App. Cas. 1236, 39 L. T. 269, 26 Week. Rep. 65, Lord Cairns said in substance: "Promoters have in their hands the creation and molding of the company; they have power to define how and when and in what shape and under what supervision it shall start into existence and begin business. If they are doing all this in order that the company may at the outset become, through its managing directors, a purchaser of property from themselves, it is incumbent upon them to provide it with a board of directors, who will meet them at arm's-length in arranging the business transaction."

The circumstances in that case were quite similar to those in this one. There was an attempt to bind the corporation by a contract purporting to have been made between the vendor and directors before the shares were offered for subscription, whereas the directors were only the associates of the vendor, who exercised no judgment of their own in behalf of the corporation.

The rule stated by Lord Cairns is said not to apply when the promoters are subscribers of all of the capital stock (*Salomon* ⁶⁵⁸ v. *Salomon & Co.*, 75 L. T. 437, 66 L. J. Ch. 35, [1897] App. Cas. 22, 45 Week. Rep. 193), or all the stock has been taken and the holders thereof assent to the transaction: *Parsons v. Hayes*, 14 Abb. N. C. 419. Then if a person acquiring stock otherwise than at first hand is deceived into doing so by fraudulent representations that the full amount of the share capital has been paid into the corpora-

tion, and that all the stock was taken on a common basis, his right of action for damages is personal, not for enforcement of the rights of the corporation: Morawetz on Corporations, sec. 290. In harmony therewith is *Stewart v. St. Louis etc. R. Co.*, 41 Fed. 736, where it was held in effect that Lord Cairns' rule did not apply because at the time of the occurrence complained of the owners of all outstanding stock consented, the transaction was fully exposed on the corporation records, and it was not then intended to solicit further subscriptions to stock. There are other circumstances where Lord Cairns' rule has been said not to apply, but in no case has it been rejected in circumstances such as, or similar to, those where it was framed and declared.

From the foregoing we deduce this: If one or more persons acquire property, intending to promote the organization of a corporation to purchase it from them at a profit to themselves and effect such purpose, limiting the membership to interested parties till the transaction is completed between them and the corporation, intending thereafter to cause the balance of the capital stock to be sold to outsiders, they being kept in ignorance of the true nature of such transaction, and effecting such intent, they are guilty of actionable fraud upon the corporation and responsible to it for the gains made. In such circumstances, in the making of the contract between the corporation and its agents, it is mere fiction as to its prospective members by original subscription. Since it has no one to stand for it as an adverse party in the transaction, no meeting of adverse minds, essential to a binding contract, occurs. The corporation is deceived, in that advantage is ~~659~~ taken of its incapacity to protect itself, as to the interests of prospective memberships by the original taking of its stock.

Applying the foregoing to the situation found to exist, all who were concerned in the transaction of buying the land at one price to turn it over to the corporation to be formed at a much greater one, and to induce others to come into the corporation in ignorance of the facts, contributing the actual capital necessary to enable them to fully accomplish their purpose, become liable to refund their profits to the corporation, which liability was enforceable in this action, unless prior to its commencement it was extinguished by the six year statute of limitations.

The action was commenced May 20, 1899, long after the expiration of six years from the time the cause of action in favor of the corporation accrued, unless the date thereof was postponed, as regards the remedy for the wrong, by subdivision 7, section 4222 of the Statutes of 1898. It is conceded that the life of the cause of action expired before such commencement, unless such subdivision applies. That provides that a cause of action for relief on the ground of fraud in a case which was on or before the twenty-eighth day of February, 1859, cognizable in a court of chancery shall not be deemed to have accrued until the discovery by the aggrieved parties of the perpetration of the fraud. Counsel for respondent argue that this action falls within that because the sole remedy afforded plaintiffs to enforce the right of the corporation was in equity, and was so at the time mentioned in such section. That overlooks the fact that the real test is, what remedy was afforded the corporation to enforce its rights in the circumstances set forth in the complaint before the adoption of the code. We need spend no time to demonstrate that it had then, as it has now, a remedy at law in such cases. It follows that before this action was commenced a cause of action of the corporation was extinguished, and that with it necessarily the right of the plaintiffs to enforce such cause of action was lost. That is distinctly ~~600~~ ruled in *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 96 Am. St. Rep. 948, 94 N. W. 171, 61 L. R. A. 918. We are unable to discover anything in that case, or in *Buttles v. De Baun*, 116 Wis. 323, 93 N. W. 5, or *Merton v. O'Brien*, 117 Wis. 437, 94 N. W. 340, referred to by counsel, that can save this case. The effect thereof is that the statute of limitations does not run in favor of a trustee of an expressed interest of that continuing nature cognizable only in a court of equity. There is nothing of that sort involved in this case, as is plainly ruled in *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 96 Am. St. Rep. 948, 94 N. W. 171, 61 L. R. A. 918.

It is suggested by counsel for respondents that the corporation was powerless to assert its rights within the life of its cause of action because those who were solely in charge of its affairs were the guilty persons, and by their position prevented anyone during such period from obtaining knowledge of the facts so that they might act in its behalf. While counsel earnestly insist that under such circumstances the statutes of limitation ought not to apply, no authority is

cited to our attention varying the unqualified language of such statutes. So far as we are advised, there is no exception to the rule of the statute to fit a case of this sort. Views elsewhere are well portrayed in *Bank of Hartford Co. v. Waterman*, 26 Conn. 324-330, thus: "Ignorance of his rights on the part of the person against whom the statute has begun to run will not suspend its operation. He may discover his injury too late to take advantage of the appropriate remedy. Such is one of the occasional hardships necessarily incident to a law arbitrarily making legal remedies contingent on mere lapse of time. Strong equitable considerations in favor of the present plaintiffs seem, however, to grow out of the fact, that they were actually betrayed into ignorance of their rights by the wrongful acts of the defendant himself. . . . It is palpably unjust for the defendant to set up the statute as a defense under such circumstances; to do so is, in one sense, taking advantage of his own wrong. Yet it is difficult to see that he is not, by the clear provisions of the statute itself, protected in so doing. ⁶⁸¹ . . . Lord Campbell properly suggests, relative to a controversy not unlike to the present, that 'hard cases must not make bad law.' . . . If the dictum of Lord Mansfield that 'there may be cases which fraud will take out of the statute of limitations,' were confirmed by direct adjudications, we should be reluctant to withhold the application of the doctrine in the present instance."

We cannot escape the conclusion that the statute of limitations pleaded had fully run in favor of the defendants before the commencement of this action and extinguished their liability.

By the COURT. The judgment is reversed and the cause remanded, with instructions to enter judgment dismissing the complaint with costs in favor of the defendants.

The respondents moved for a rehearing, and the following opinion was filed January 31, 1905:

MARSHALL, J. The motion for rehearing, in this case, as all such motions which are made in the proper professional spirit are, was welcomed here and has received consideration. There was no need whatever for the learned counsel's apology for making it. It were better if they had omitted from the argument the words "Well, as I understand the aversion of this court to rehearings." It involves an assumption that

has no foundation whatever. This court has no "aversion" to the assertion by any attorney of any right which the statute, court rules or the practice affords him. It has no feeling but that of respect for all considerate efforts of members of the profession to safeguard the rights of their clients and to aid the court in the proper administration of justice. Occasions have been improved to admonish practitioners to exercise care not to subject their clients to the burdens of additional cost by inconsiderate motions for rehearings, and if it be necessary in order that such admonition shall be efficient in that regard it might well be repeated. It is well appreciated here that ⁶⁸² counsel may inadvertently overlook some important matter, and that the court may do so, giving rise reasonably to the thought that if such matter had been fully presented and considered a different conclusion might have been reached. No feeling of hesitancy exists here to correct errors of counsel or the court's own errors whenever there is opportunity therefor. However diligent we may be to discover the right of any matter, mistakes are liable to occur, calling for motions for rearguments. That is well understood. The ultimate end sought by all is to weigh out justice with the greatest possible certainty and accuracy, and nothing consciously is allowed here to stand in the way thereof. Certainly, no "aversion" to the reception of a motion for a rehearing so stands. The statutory right to make such motion is a valuable aid to the end sought when invoked with that careful consideration of a case which should always be devoted thereto before exercising it: *Brown v. Chicago etc. R. Co.*, 102 Wis. 150, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579; *Illinois S. Co. v. Bilot*, 109 Wis. 430, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402. If counsel conclude that a question for any cause has been overlooked or not adequately presented, and a re-presentation of the case in that regard may, with reasonable probability, change the result, they should perform the duty to their clients and the court to make the motion to that end.

Counsel now present for consideration propositions which only incidentally, if at all, were mentioned on the former argument. They frankly confess that the importance of such propositions was not appreciated by them, if thought of seriously at all, until aroused in that regard by some questions propounded from the bench on the argument. We will say, however, at the outset, that the subjects involved did not pass

here without the most careful study, as the result will now more fully indicate.

Counsel's second proposition, it would seem, ought to have first place. "The right of action at law upon the subscription ⁶⁶³ list signed by these defendants did not accrue in favor of the corporation in 1892, and it did not accrue until these plaintiff stockholders made their demand for action in February, 1899, and the defendant then denied any liability and refused to take any action." In support of that it is said there was no right of action in advance of a call being properly made and the maturity of the demand thereunder, the statute on that subject and the articles of organization of the corporation and its by-laws being referred to. We have not heard before anything to indicate that anyone supposed this to be an action to recover upon the contractual liability of stockholders. There is no suggestion in the complaint that it is of that character. On the contrary, the whole theory from first to last has been that it is an action against the promoters and trustees of a corporation to recover unlawful profits they obtained while acting in a fiduciary capacity for it. The claim of the plaintiffs all through the case is that defendants, while acting in such fiduciary capacity, purchased land at one price and turned it over to the corporation ostensibly at cost, but really for an advance of over fifty thousand dollars, and that to the extent of the profits so obtained they became liable to such corporation. The mere statement of the real nature of the action, which is fully set forth in the history of the case accompanying the former opinion, renders it unnecessary to say more on this point.

Counsel's next proposition is that "the defendants are estopped from setting up and receiving the benefit of the six years' statute of limitations." That presents the question of whether such statute, as to an action in favor of a corporation against its officers, runs while they themselves are the ones clothed with the sole authority to protect its interests, and fraudulently neglect to do so. True, as said by counsel before and as said now, the corporation was powerless to enforce its right to recover the unlawful profits through the instrumentality of its officers, since they were the guilty parties and controlled ⁶⁶⁴ what should and what should not be done in its behalf. Formerly, we said: Counsel insist that under such a situation the statute ought not to apply, but no authority is cited to our attention as a basis for varying

the unqualified language thereof, and so far as we can discover there is none to fit the case in hand. Reflection has resulted in counsel planting themselves squarely and confidently on the unqualified doctrine that the statute of limitations does not run in favor of one seeking to take advantage of it, as to a cause of action based on fraud, so long as the adverse party has no knowledge of the facts constituting such fraud. A large number of authorities are cited to our attention as supporting that view, commencing with *Encking v. Simmons*, 28 Wis. 272, where Dixon, C. J., used language by way of argument suggesting that a view was then entertained, at least by himself, that the statute of limitations might be avoided for actual fraud. No question in that regard, however, was in any wise involved in the case, even incidentally, nor was the doctrine suggested indorsed as good law by the writer of the opinion, except inferentially: "There is [said the chief justice], for example, very much and very high authority for saying that the bar of the statute of limitations may be avoided at law for fraud in the party seeking to take advantage of it."

True, there is such authority that way, but also true when analyzed the same is found to have no application whatever to a situation wholly otherwise regulated by statute, as in this state. It is significant that the remark quoted, though made over thirty years ago, has not since been referred to in any opinion in this court, and that the doctrine there said to be supported by "very much and very high authority" has never been incorporated into our system. A brief history of such doctrine will fully clear up all uncertainty, if any exists, as to whether it should be adopted here.

The whole system of extinguishing rights, or rights of action, ⁶⁶⁵ by delay in their enforcement is really statutory. True, at an early day in England by the dictum of Lord Mansfield in *Bree v. Holbech*, 2 Doug. 654, the idea is said to have been originally advanced that fraudulent concealment prevents the running of the statute of limitations. It is truly said by the text-writers that such idea was never judicially incorporated into the English system as law, but was by act of parliament. At an early day in this country it was adopted by some of the states, notably by Massachusetts and Maine, and later was adopted by some others. It was incorporated into the statutes of many of the states in some form, in some cases being restricted, either expressly

or by judicial construction, to actions at law, and in others to actions in equity. That accounts for all of the decisions referred to in Encking v. Simmons, and the large addition now cited to our attention by counsel. In Wood on Limitations, second edition, section 274, the matter is referred to in these words: "In Massachusetts, before the present statutory exception existed, the fraudulent concealment of a cause of action was held to be a good replication to a plea of the statute. In Maine, also, this rule was adopted. The doctrine of these cases was predicated upon a dictum of Lord Mansfield, in an English case; but this dictum seems never to have been followed in the English cases in actions at law, nor do the American cases before cited seem to have been generally followed in this country."

There are three general classes of authorities found in the books on the subject under discussion, and unless the statutory differences giving rise thereto are appreciated, one is quite liable to fall into confusion as to how the law ought to be declared under a statute like ours. The first includes the states where there is no statute on the subject, holding that fraud concealed by the person invoking the statute of frauds postpones its operation. They are, in the main, the following: Massachusetts and Maine, prior to the adoption of their statutes on the subject, Vermont, Rhode Island, New Hampshire, ⁶⁰⁶ Louisiana, New Jersey, Arkansas, Delaware, Pennsylvania and Texas. Sixteen of the cases cited by counsel are from those states. That they throw no light on what the rule ought to be where the matter is governed by statute seems plain. The second class includes the states having a general statutory exception to the running of the limitation statutes in case of concealed fraud until the discovery of the facts by the injured party. They are: Maine and Massachusetts, after the adoption of their present statute, Connecticut, Alabama, Georgia, Indiana, Illinois, Mississippi, Maryland, Michigan and New Mexico. Ten of the cases cited to our attention are from those states, and no time need be spent in showing their inapplicability to the case in hand. The third class includes states having such a statutory exception in cases cognizable in equity, or solely so cognizable. They are: Iowa, Colorado, Florida, Kentucky, North Carolina, South Carolina, Kansas, Missouri, New York, Ohio, Nebraska, Nevada, California, Arizona, Minnesota, Utah, Idaho, Montana, Wyoming, and this state. Of the sixty or

more cases cited by counsel, there is no Wisconsin case—except *Encking v. Simmons*, 28 Wis. 272, which decided nothing on the subject, as we have seen—and no others in such class, except *City of Oakland v. Carpentier*, 13 Cal. 540, *Ryan v. Leavenworth etc. R. Co.*, 21 Kan. 365, *City of Ft. Scott v. Schulenberg*, 22 Kan. 648, and *Arnold v. Scott*, 2 Mo. 13, 22 Am. Dec. 433. An explanation of those cases can be very briefly given. The California case was not an action at law, or an equitable action to enforce one at law, as is the case before us, but was strictly an action cognizable only in equity, and so in harmony with the statute on the subject. The court held that the limitation period did not begin until the discovery of the facts constituting the fraud. The same is true of the first of the Kansas cases referred to, and the other, so far as it touches on the subject at all, seems to be against the contention counsel seeks to maintain. As to the Missouri case, counsel was either misled by the syllabus, which does not correctly state ⁶⁶⁷ the rule of the case, into citing the decision, or by a citation in some publication where the author was so misled. The decision was based on a clause of the Missouri statute which provided that any obstruction of the action, whether by direct or indirect means, will, while it lasts, postpone the running of the limitation period. We have no such statute. The case was explained and limited in *Smith v. Newby*, 13 Mo. 159, where it was said that the syllabus was misleading.

As to concealed fraud postponing the running of the statute of limitations respecting a cause of action at law, it has been expressly repudiated in the following states having statutes similar to ours: New York, *Troup v. Smith's Exrs.*, 20 Johns. 33; Kentucky, *Ellis v. Kelso*, 18 B. Mon. 296, where a clerk made a fraudulent entry upon his employer's books, and it was held that the statute ran from the date of the entry; North Carolina, *Hamilton v. Shepperd*, 3 Murph. 115; South Carolina, *Miles v. Berry*, 1 Hill, 296, where the maker of a note fraudulently obtained possession of it, and kept it until the statute had run upon it, and it was held that such fraud did not prevent the running of the statute. The same rule has been declared in the following cases belonging to the first class, or having a statutory provision like that which ruled *Arnold v. Scott*, 2 Mo. 14: Mississippi, *Wilson v. Ivy*, 32 Miss. 233; Virginia, *Rice v. White*, 4 Leigh, 474. The same rule prevails in states belonging to the second class: Tennes-

see, *York v. Bright*, 4 Humph. 312; *Smith v. Bishop*, 9 Vt. 110, 31 Am. Dec. 607; *Fee's Admr. v. Fee*, 10 Ohio, 469, 36 Am. Dec. 103.

Thus it will be seen that of all of the authorities cited by counsel there is no support whatever for the proposition advanced that under a statute such as ours the running of the statute of limitations, except in the particular class of cases referred to in such states, is affected by fraud, while a careful classification of them with reference to the statutory differences under which they were made, and judicial declarations all, directly or by implication, sustain the conclusion to which ⁶⁶⁸ we formerly arrived. There are expressions of judges of great ability to the effect that there is much conflict and confusion in the authorities on this subject, but it is believed that the supposed conflict does not exist in fact to any considerable extent. Substantially all of what appears to have led to a contrary view, by a proper classification of the decisions according to the various statutes, will be found to have no real basis. We have not attempted here to do more than to classify them in a general way.

Counsel suggest that the language quoted in our former opinion from *Bank of Hartford Co. v. Waterman*, 26 Conn. 324, is not authoritative, because it was entirely unnecessary to the case, and, further, because many cases could have been found at that time where it had been held that fraud, concealed, prevented the running of the statute of limitations. True, there were such cases, and we have briefly, but fully, explained them in harmony with the views formerly expressed. The quotation voices the law under the Connecticut statute.

Several federal cases are cited to our attention, which, when rightly understood, are unimportant. *Bailey v. Glover*, 21 Wall. 342, 22 L. ed. 636, is the most significant of them. That is to the effect that under the federal system the rule is, as to cases not governed by state statutes and decisions, the court being left free to declare the law according to its own views, and there being no federal statute interfering therewith, the running of the statute of limitations is postponed in case of fraud, concealed by the party invoking such statute, till the adverse party discovers the same. If there had been a United States statute expressly providing when fraud shall so operate, the decision would doubtless have been that all cases not covered thereby were excluded. In *Troup*

v. Smith's Exrs., 20 Johns. 33, the court was urged to engraft on the statute of limitations of New York an exception saving actions at law from the operation of such statute in case of concealed fraud, preventing ⁶⁶⁹ their being commenced within the limitation period, and replied thereto thus: "The dictum of Lord Mansfield, in Bree v. Holbech, 2 Doug. 654, is the only instance in which such a position was ever advanced in Westminster Hall; and when it is further considered that his lordship had an inclination to entrench on courts of equity, that mere dictum cannot be regarded as authority. . . . Courts of law are expressly bound by the statute. . . . I know of no dispensing power which courts of law possess, arising from any cause whatever." The court said further, substantially: The statute having made provision for the postponement of the running of the statute of limitations in certain cases, it would be an assumption of legislative authority to introduce any other. "The plaintiff's case may be a hard one; but that affords no reason for construing away a statute of great public benefit, and which, in many cases, is a shield against antiquated and stale demands."

That decision made over seventy years ago has stood the test of time without a word of criticism in New York, or elsewhere under a like statutory system to that which the court had under consideration.

In *Miles v. Berry*, 1 Hill (S. C.), 296, speaking on the same subject, the court said: "Many of the difficulties, in cases upon the statutes of limitations, have arisen from losing sight of the words of the statute, and looking to what appeared to be just and right between the parties. The judges here and elsewhere have, however, set about the work of reform in this respect, and are now endeavoring to conform to the statute." To allow the time of the discovery of the fraud to be regarded as that of the maturity of the injured party's cause of action "would be to make and allow, by judicial construction, an exception to the statute of limitation, which the legislature did not think proper to make."

In line therewith Chancellor Kent said in *Demarest v. Wynkoop*, 3 Johns. Ch. 129-142: "The doctrine of any inherent equity creating an exception as to any disability, where ⁶⁷⁰ the statute of limitations creates none, has been long, and, I believe, uniformly exploded. A statute is to be read as it is written without any arbitrary substitu-

tion or addition to its meaning." To the same effect are *Carden v. Louisville etc. R. R. Co.* 101 Ky. 114, 39 S. W. 1027; *Powell v. Koehler*, 52 Ohio St. 103, 49 Am. St. Rep. 705, 39 N. E. 195, 26 L. R. A. 480; 19 Am. & Eng. Ency. of Law, 2d ed., 212.

In the light of the foregoing, it would seem that the right of the matter under discussion is unmistakable. The statute (Stats. 1898, sec. 4222) provides that "the cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." By one of the most familiar canons of construction all other cases are thereby excluded. "*Expressio unius est exclusio alterius.*" The mere fact that the enforcement of the statute according to the foregoing leads occasionally, as it does seemingly in this case, to great hardship does not furnish the slightest reason why the courts should ingraft an exception upon it. The enactment of the law-making power within its legitimate field must not be obstructed by the judicial administration. Such power is ample, if it sees fit, to extinguish any right enforceable by an action, if judicial remedies for such enforcement are not invoked within such reasonable time as it sees fit to name. The possessor of the right may be under disability to personally enforce the same within the prescribed period by reason of infancy, insanity, imprisonment or other cause, and yet the statute in general terms, not containing any exception to save the right, will extinguish it: *Vance v. Vance*, 108 U. S. 514, 521, 2 Sup. Ct. Rep. 854; *Carden v. Liverpool etc. R. Co.*, 101 Ky. 114, 39 S. W. 1027. The legislature is the judge, and the sole judge in such matters, subject to no judicial review whatever, so long as it acts within the boundaries of reason. It is far better that occasionally one should suffer severely from the enforcement of the law, as the court finds it, than that they should endeavor to bend the law out of its manifest ⁶⁷¹ scope to avoid that result. The truth of the saying that "hard cases make bad law" we need not go far to demonstrate. After courts have done all that they can by the exercise of the greatest diligence to steer clear of the danger in that regard they cannot hope to be universally successful.

We should not close this opinion without referring, at least briefly, to the doctrine urged upon our attention that

equity will always furnish a remedy for any wrong, other than a mere moral transgression, if legal remedies are inadequate or do not exist at all. It is not infrequently that we see that valuable doctrine invoked where it has no proper place. It is never applicable to give a remedy for a wrong, so called, which is not a wrong at all, because the written law makes it otherwise. Such wrongs, if the injuries may be so designated at all, are not within the maxim "there is no wrong without a remedy": *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1.

The last suggestion of counsel is that respondents having proceeded in good faith should not be made to pay costs in this court or in the court below. Such a practice, if once adopted, would compel the defendant in most any case to wholly bear the burden necessary to his defense, since, generally, the plaintiff thoroughly believes in his side of the case. There is no good reason for making this case an exception to the general practice of awarding costs to the defendant where in an equity action he prevails as to the entire cause of action set forth in the complaint. According to the conclusion to which we have arrived the defendants have so prevailed.

By the COURT. The motion is denied.

The Relation of Promoters of a Corporation to the company is discussed in the monographic note to Pittsburgh Min. Co. v. Spooner, 17 Am. St. Rep. 161-168; and in the subsequent cases of *Bosher v. Richmond etc. Land Co.*, 89 Va. 455, 37 Am. St. Rep. 879; *Yale etc. Stove Co. v. Wilcox*, 64 Conn. 101, 42 Am. St. Rep. 159. They cannot legally take any advantage over the members of the corporation, and are accountable to it for any profits realized from a violation of their duty in this respect: *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, 53 Am. St. Rep. 917. If one acting as promoter and subsequently as president of a street railway corporation renders services to and advances money for it, this may entitle him to compensation, but cannot authorize him to take and hold property given as a bonus for the construction of the road, unless he is authorized to do so by the corporation itself: *Scott v. Farmers' etc. Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835. See further on the right of promoters to compensation, *Taussig v. St. Louis etc. R. R. Co.*, 166 Mo. 28, 89 Am. St. Rep. 674, and cases cited in the cross-reference note thereto.

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BILLS AND NOTES.***Negotiability.***

1. MORTGAGE NOTES—Negotiability—Collateral Agreements.—Although an ordinary negotiable note, accompanied by an ordinary real estate mortgage with the ordinary covenants to pay taxes, and to maintain insurance, and that in case of failure to pay interest, taxes, or insurance, the principal sum shall, at the option of the mortgagee, become due without notice, form two separate instruments and are parts of the same transaction, yet each relates to its own subject matter and does not interfere with the other. The covenants and conditions in the mortgage are simply agreements for the preservation of the security, not intended or fitted to qualify or affect in any way the absolute promises contained in the mortgage note, and do not enter into or change it in the least, nor affect its negotiability. (Wis.) Thorp v. Mindeman, 1003.

2. MORTGAGE NOTES—Negotiability.—An ordinary note secured by a real estate mortgage is negotiable, although it provides that upon default in the payment of interest, or failure to comply with any conditions of the mortgage, the whole principal shall, at the option of the mortgagee, become due and payable. (Wis.) Thorp v. Mindeman, 1003.

3. BILLS AND NOTES—Indorsement as Affecting Negotiability. If a negotiable note is indorsed "For value received I hereby sell, transfer, and assign the within note without recourse," such indorsement and the addition of the words "without recourse" do not impair the negotiability of the note. (Wis.) Thorp v. Mindeman, 1003.

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4. DURESS, Note Given by Mother, When Voidable for.—Though one is legally in prison charged with crime, a note obtained from his mother by his counsel on the threat that unless it was given, the trial would be postponed and the accused kept indefinitely in jail, she being far away from home and friends, is obtained by duress and hence not enforceable against her. (Ga.) Bailey v. Devine, 153.

5. PROMISSORY NOTE, Consideration for, When Insufficient.—A note given by the mother of a person imprisoned on a criminal charge to the latter's attorney, promising to pay him for services previously rendered by another attorney to secure the release from jail of witnesses against the accused, is without consideration. (Ga.) Bailey v. Devine, 153.

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6. BILLS AND NOTES—Indorsement by Fraud—Bona Fide Holder.—If the maker of a note payable to himself is induced by a fraudulent trick to indorse it, he being ignorant of the fact that he has indorsed it, and without having any intention to indorse it, he is not liable thereon, even to a bona fide holder for value. (Wash.) Yakima Valley Bank v. McAllister, 823.

7. BILLS AND NOTES—Indorsement by Fraud—Evidence.—If the maker of a note payable to himself alleges in defense that his indorsement thereof was procured by a fraudulent trick, without intent on his part to indorse it, evidence of the perpetration of a similar trick on others, by those who obtained his indorsement, is admis-

sible, even against a bona fide holder of the note, to show a general scheme to defraud. (Wash.) *Yakima Valley Bank v. McAllister*, 823.

8. **BILLS AND NOTES—Exclusion of Evidence.**—If the maker's indorsement of a note is denied, expert evidence offered only in rebuttal as to the genuineness of the signature is not admissible, the burden of proof being upon the plaintiff to establish the genuineness of such signature as part of his case in chief. (Wash.) *Yakima Valley Bank v. McAllister*, 823.

Conflict of Laws.

9. **CONFLICT OF LAWS.**—If a Note has been Executed and Made Payable in a State, its validity, force, and effect are dependent on the laws of that state. (Ga.) *Bailey v. Devine*, 153.

10. **CONFLICT OF LAWS—Place of Liability.**—The liability of a person upon a note or other obligation is fixed and determined by the law of the place where the obligation is created, but all matters appertaining to the enforcement of the remedy are controlled by the law of the forum. (Wash.) *Clark v. Eltinge*, 858.

11. **CONFLICT OF LAWS—Husband and Wife—Wife's Liability.** Whether a wife is personally liable on a note executed by her husband while a resident of another state depends upon the law of that state at the time when the debt was contracted, and such law is presumed to be the same as the law of the state where the action is brought. (Wash.) *Clark v. Eltinge*, 858.

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1. **MARRIAGE CONTRACTS—Breach of Under Advice of Parent.**—A parent has a right to advise his child whether he or she shall enter into a marriage contract, and also to advise the breach of such contract already entered into, when in the judgment of the parent the marriage ought not to take place, and such advice or the result thereof is not actionable. (Ind. App.) *Leonard v. Whetstone*, 252.

2. **MARRIAGE CONTRACTS—Breach of Because of Slanderous Charges.**—If a person is induced to refuse to comply with his agreement to marry by false and slanderous charges made against the other party by a third person, an action will lie against such third person for libel or slander, but not for causing a breach of the contract to marry. (Ind. App.) *Leonard v. Whetstone*, 252.

3. **MARRIAGE CONTRACTS—Breach of Under Parent's Advice.** A parent's advice inducing their son to refuse to perform his contract to marry another is not an actionable wrong. (Ind. App.) *Leonard v. Whetstone*, 252.

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2. CANCELLATION OF FORGED INSTRUMENTS—Parties.—If two out of three of the apparent makers of a joint note seek to have it canceled on the ground that their signatures thereto were forged, the legal representatives of the third maker, since deceased, are proper, but not necessary, parties. (Wash.) Ritterhoff v. Puget Sound Nat. Bank, 791.

CARRIERS.*In General.*

1. RAILROADS—Freight Rates—Misrepresentation of Agent.—If the agent of a railroad company misrepresents its freight rates, whereby a person is induced to make a contract for the sale of goods at a certain price and is compelled to pay a higher freight rate than that represented, thus sustaining a loss, the railroad company is liable in damages for such loss. (Tex.) Texas etc. Ry. Co. v. Mugg, 633.

2. COMMON CARRIERS cannot by Contract Limit Their Liability for their own negligence or that of their servants. (Pa. St.) Eckert v. Pennsylvania R. R. Co., 591.

Carrier of Livestock.

3. RAILROADS as Carriers of Livestock—Negligence—Suitable Cars.—If a railroad company undertakes to transport livestock beyond its own line, it must not only carry it to the terminus of its own road, but also deliver it at that point to the connecting carrier in a car properly constructed and suitable for the purpose of transportation to the final destination. A failure to perform this duty is negligence which renders the carrier liable for resulting injury or loss. (Pa. St.) Eckert v. Pennsylvania R. R. Co., 571.

4. CARRIERS OF LIVESTOCK—Negligence—Suitable Cars.—If a carrier undertakes to transport livestock beyond his own line, the fact that a person employed by the shipper to accompany the stock is present when it is transferred to an unfit car at the terminus of the first carrier, and assists in making the change, does not relieve such carrier from the duty of furnishing a suitable car, nor from liability for injury or loss, resulting from a failure to do so. (Pa. St.) Eckert v. Pennsylvania R. R. Co., 571.

5. CARRIERS OF LIVESTOCK—Notice of Loss—Waiver.—A carrier may insert in its contract to transport livestock a provision requiring notice of a claim for damages within a stipulated time, but this provision is for the benefit of the carrier and may be waived by it, and will be deemed to have been waived, when the carrier has actual notice of the loss and attendant facts within the stipulated time, and does not raise any question as to want of notice until the time of the trial. (Pa. St.) Eckert v. Pennsylvania R. R. Co., 571.

6. CARRIERS OF LIVESTOCK—Negligence—Form of Action.—For negligence by a common carrier in transporting livestock, intrusted to it, the shipper may, at his election, bring either an action ex contractu or an action ex delicto. (Pa. St.) Eckert v. Pennsylvania R. R. Co., 571.

Carrier of Passengers.

7. **CARRIERS OF PASSENGERS** are not Bound to Accept and carry without an attendant one who, because of physical or mental disability, is unable to take care of himself. (Miss.) Illinois Central R. R. Co. v. Smith, 293.

8. **CARRIERS OF PASSENGERS** may Deny Transportation to any person who, on account of physical or mental disability, is unable to care for himself, or liable on account of that incapacity to become a burden upon fellow-passengers or to require extra attention from the carrier. (Miss.) Illinois Central R. R. Co. v. Smith, 293.

9. **CARRIERS—Passengers—Persons Under Incapacity—Duty to Carry.**—Any person desiring transportation by a common carrier is entitled to passage upon payment of fare, notwithstanding his seeming mental or physical incapacity, if, as a matter of fact, he is competent to travel alone without requiring other care than that which the law requires the carrier to bestow upon all passengers alike. If this proof of capacity is in any manner brought to the knowledge of the agent of the carrier, the latter is liable in damages for any exclusion of such person from its trains. (Miss.) Illinois Central R. R. Co. v. Smith, 293.

11. **CARRIERS—Passengers—Blind Persons.**—If a blind person applies to purchase a passenger ticket, being himself unknown to the ticket agent, and a ticket is refused, the carrier, is not by this act alone liable in damages, but if such agent knows of the ability of such blind person to travel alone, or if the fact of such ability is made known to him in any manner, and he then arbitrarily refuses to sell such person a ticket, the carrier becomes liable for both compensatory and punitive damages. (Miss.) Illinois Central R. R. Co. v. Smith, 293.

12. **CARRIERS—Passengers—Blind Person—Duty to Carry.**—It is the duty of a ticket agent of a carrier of passengers to listen to the explanation made by a blind person desiring to purchase a ticket and judge of his competency to travel alone in the light of the facts then made known to him, and the question of the reasonableness of his refusal to furnish such ticket is one of fact to be submitted to the jury, should litigation arise. (Miss.) Illinois Central R. R. Co. v. Smith, 293.

13. **CARRIERS—Passengers—Duty to Carry Blind Man—Damages for Refusal.**—If the ticket agent of a railroad company refuses, wantonly and arbitrarily, to sell a passenger ticket to a blind man, knowing at the time that such person is a thoroughly competent traveler alone, the carrier is liable in punitive damages. (Miss.) Illinois Central R. R. Co. v. Smith, 293.

Baggage.

14. **CARRIERS—Baggage.**—Whatever a passenger takes with him, for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as baggage, but only such articles come within that term. (Miss.) Yazoo etc. R. R. Co. v. Georgia Home Ins. Co., 265.

15. **CARRIERS—Baggage—Business Papers.**—Memoranda and papers carried by an agent in his trunk, but belonging to his principal, and relating exclusively to his business, not designed for the personal use or convenience of the agent, but only as business papers in the transaction of the business of the principal, are not baggage, and the

carrier is not liable for delay in their shipment and delivery, when checked as baggage. (Miss.) Yazoo etc. R. R. Co. v. Georgia Home Ins. Co., 265.

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In General.

1. CONSPIRACY—Co-conspirators.—It is not necessary, in order to establish that the defendants are co-conspirators, to prove that the conspiracy originated with them, or that they met during the process of the concoction of the scheme. Every person entering into a conspiracy already formed is deemed in law a party to all acts done by any of the other parties, before or afterward, in furtherance of the common design. (Vt.) Patch Mfg. Co. v. Protection Lodge, 765.

2. CONSPIRACY—Co-conspirators.—One to be chargeable as a co-conspirator need not have been an original contriver of the mischief, for he may become a partaker in it by joining the others while it is being executed. If he actually concurs, no proof is required of an agreement to concur. (Vt.) Patch Mfg. Co. v. Protection Lodge, 765.

3. CONSPIRACY—Co-conspirators.—If there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are at all the time engaged. (Vt.) Patch Mfg. Co. v. Protection Lodge, 765.

4. **CONSPIRACY—Criminal.**—A combination of persons for the accomplishment of a particular object may be criminal, either because the object itself is criminal in its character, or because the means by which that object is to be effected, are criminal. (Conn.) *State v. Stockford*, 28.

Conspiracy to Strike.

5. **CONSPIRACY—Liability for.**—If a labor union forms a conspiracy, and a person not a member of such union voluntarily joins in the doing of unlawful acts in aid of the scheme, the union is liable for his acts. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

6. **CONSPIRACY TO STRIKE.**—Whether a combination of workmen by concerted action to strike and leave the employment of their employers is lawful or criminal depends upon its object and the manner in which the strike is conducted. (Conn.) *State v. Stockford*, 28.

7. **CONSPIRACY TO STRIKE.**—A combination to cause a strike of workmen for the purpose of injuring and destroying the business and property of another, or of depriving another of his liberty or property, without just cause, is both unlawful and criminal. (Conn.) *State v. Stockford*, 28.

8. **CONSPIRACY TO STRIKE.**—A combination which contemplates the use of force, threats, or intimidation, to induce workmen to abandon together the service of their employers, is criminal. (Conn.) *State v. Stockford*, 28.

9. **CONSPIRACY TO STRIKE—Lawful Purpose.**—Workmen may lawfully combine to accomplish their withdrawal in a body from the service of their employers, for the purpose of obtaining an advance in wages, a reduction in the hours of labor, or any other legitimate advantage, even though they may know that such action will necessarily cause injury to the business of their employers, provided such abandonment of work is not in violation of any continuing contract, and is conducted in a lawful manner, and not under such circumstances as to wantonly and maliciously inflict injury to person or property. (Conn.) *State v. Stockford*, 28.

11. **CONSPIRACY—Criminal—Strikes.**—A combination to compel workmen and others, by threats and intimidation, to refrain from doing that which they have a legal right to do, is criminal. (Conn.) *State v. Stockford*, 28.

12. **CONSPIRACY—Criminal—Strikes.**—A combination of workmen to prevent their employers from carrying on business, and to ruin and destroy their business and property, is criminal. (Conn.) *State v. Stockford*, 28.

13. **CONSPIRACY—Criminal—Strikes.**—The act of a combination of workmen in instructing pickets, or members in open meetings, to use violence to prevent workmen from continuing in the service of their employers, is unlawful and criminal. (Conn.) *State v. Stockford*, 28.

Evidence.

14. **CONSPIRACY.—Evidence of Acts of Persons Accused** of conspiracy and of their agents, in endeavoring to accomplish the purpose of the conspiracy, is admissible to show the manner in which it was designed to be accomplished, and, after prima facie proof of the alleged conspiracy, evidence of the acts and declarations of the individual conspirators is admissible. (Conn.) *State v. Stockford*, 28.

15. CONSPIRACY—Evidence.—If persons are accused of a conspiracy to prevent an employer from carrying on his business and to ruin and destroy it, evidence of the number of customers lost by such employer since the formation of such conspiracy is admissible. (Conn.) *State v. Stockford*, 28.

16. CONSPIRACY—Evidence.—If persons are accused of conspiracy to prevent an employer from carrying on his business, evidence that one of his workmen, who had been insulted by a conspirator, was afterward shot at while on duty, is admissible. (Conn.) *State v. Stockford*, 28.

17. CONSPIRACY—Evidence.—If a person accused of criminal conspiracy testifies that a labor union involved in such conspiracy had instructed its pickets to use no violence, evidence is admissible to show that such union had paid counsel to defend its men arrested for using violence. (Conn.) *State v. Stockford*, 28.

18. CONSPIRACY—Evidence.—In an action against a lodge of a mechanics' union for damages for interfering with the business of another by means of a boycott and strike, in pursuance of a conspiracy, testimony that a member of such union informed the witness that he had been ordered by his union to quit work but that he would later withdraw from such union and return to work, together with the fact that he did quit work, did not withdraw from the union, but remained an active member, and that he had no personal grievance, is admissible as tending to show the existence of the conspiracy. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

19. CONSPIRACY—Evidence.—In an action against a lodge of a mechanics' union for damages for interfering with the business of another by means of a boycott and strike in pursuance of a conspiracy, evidence that certain papers purporting to emanate from the defendant or a committee of the defendant bore its seal is admissible as tending to show the source of such papers, although the defendant was not a corporation. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

20. CONSPIRACY—Boycott—Evidence.—In an action against a mechanics' union to recover for an interference with the business of another by means of a strike in pursuance of a conspiracy, evidence that several members of such union whose names were signed to a writing directed to plaintiff relative to a settlement of such union's demands, and purporting to emanate from its committee and bearing its seal, subsequently called upon plaintiff in relation to the strike brought about by such union, is admissible in connection with the denial of such men that they signed such writing, or were authorized by such union to sign it. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

21. CONSPIRACY—Strikes—Evidence.—In an action against a mechanics' union to recover damages for an interference with the business of another by means of a strike in pursuance of a conspiracy, evidence that many circulars relative to the strike of plaintiff's employes, ordered by such union, and bearing the names of its officers, and obviously designed to prevent workmen from entering plaintiff's employ, were posted and widely distributed, is admissible, and raise the inference that such circulars were promoted and distributed by such union. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

22. CONSPIRACY—Evidence to Establish.—If it is sought to establish a conspiracy by a mechanics' union, and there is some evidence of the conspiracy, testimony that a certain person was em-

ployed by such union to assist in a strike and prevent men from going to work, together with evidence of his acts of violence in this connection, is admissible. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

23. CONSPIRACY—Evidence of Acts of Conspirators.—In an action against co-conspirators, the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

24. CONSPIRACY.—Declarations made by one conspirator, pursuant to the common object, and in furtherance of it, are admissible against all of them when the combination is once established. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

25. CONSPIRACY—Order of Proof.—If, in an action against conspirators, all of plaintiff's evidence has some tendency to show the conspiracy claimed and the results of it and efforts made by the conspirators to make it effectual, no complaint will lie as to the order in which the proof was received. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

26. CONSPIRACY—Threats of Conspirators—Damages.—In an action against a machinists' union to recover for a strike and boycott pursuant to a conspiracy, any threat made by the defendant or by anyone associated with it, to boycott any boarding-house keeper who entertained, or any merchant who supplied workmen in the employ of the plaintiff, with the necessities of life, if made directly and exclusively to such persons, is an unlawful interference with the rights of the plaintiff. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

27. CONSPIRACY—Records of Conspirators.—In an action to recover for a strike and boycott pursuant to a conspiracy, and upon proof of such conspiracy, the fact that a common design existed between different associations, with whom the defendant is alleged to have conspired, makes the records of all such associations the records of the defendant, and admissible in evidence against him as such. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—Conveyance by Wife Alone.—A statute authorizing a court of chancery in its discretion on a wife's petition to empower her to convey land by her separate deed, is unconstitutional as an attempt to deprive a husband of his property without due process of law, and without making the exercise of the power depend upon proof of any prescribed facts. (Vt.) *Hubbard v. Hubbard*, 749.

2. CONSTITUTIONAL LAW—Vagueness of Statute.—A statute authorizing the appropriation of water for irrigation and other purposes, declaring it to be public property for such purposes, and designating the territory in which it is to operate as "those portions of the state in which by reason of the insufficient rainfall, or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes," is not void for vagueness in designating the localities in which it shall operate. Such statute operates throughout the state where the conditions named exist. (Tex.) *Borden v. Trespalacios Rice etc. Co.*, 640.

3. POLICE POWER—Presumption.—If the state directs some specific act to be done in the exercise of the police power, which

without authorization would constitute a private nuisance, but does not specifically direct how such act shall be done, it will not be presumed, in the absence of public necessity, that the state has exercised such power so as to injure private property. (Ind. App.) *Anable v. Board of Commrs. etc.*, 173.

See Eminent Domain; Physicians and Surgeons; Statutes.

CONTAGIOUS DISEASES.

See Health.

CONTRACTS.

Acceptance.

1. **CONTRACT—Acceptance.**—A Request for a Change or modification of a proposed contract made before an acceptance thereof amounts to a rejection of it. (W. Va.) *Turner v. McCormick*, 904.

2. **CONTRACT—Acceptance.**—A Mere Inquiry as to whether one proposing a contract will alter or modify its terms, made before acceptance or rejection does not amount to a rejection; and, if the offer is not withdrawn before acceptance made within a reasonable time, it becomes a binding contract. (W. Va.) *Turner v. McCormick*, 904.

3. **CONTRACT—Acceptance.**—A Request, Suggestion, or proposal of alteration or modification, made after an unconditional acceptance of an offer, and not assented to by the opposite party, does not affect the contract put in force and effect by the acceptance, nor amount to a breach thereof, giving a right of rescission. (W. Va.) *Turner v. McCormick*, 904.

Rescission.

4. **CONTRACT—Breach.**—The Mere Renunciation of an executory contract by one of the parties, which is retracted within a few minutes thereafter, and before any declaration has been made or act done by the other party in respect thereto, and before any change in the situation of the parties or the subject matter of the contract has taken place, does not constitute a breach of the agreement. (W. Va.) *Swiger v. Hayman*, 899.

Construction.

5. **CONTRACTS.**—Construing Contemporaneous Instruments Together simply means, that if there is any provision in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated, and this does not mean that the provisions of one instrument are imported bodily into the other, contrary to the intent of the parties. (Wis.) *Thorp v. Mindeman*, 1003.

Duress and Illegality.

6. **DURESS OF IMPRISONMENT** is Available as a Defense to a contract if the imprisonment, or threatened imprisonment, was unlawful. (Ga.) *Bailey v. Devine*, 153.

7. **CONTRACTS—Illegal—Enforcement.**—Neither a court of law nor of equity will entertain a suit by either party to an illegal contract against the other, when the contract is against public policy, whether it is executory or executed. (Miss.) *Woodson v. Hopkins*, 275.

8. **CONTRACTS—Illegal—Recovery on Transaction Growing Out of.**—Whenever a party seeking to recover is obliged to make out

his case by showing an illegal contract, or through the medium of such contract, or when it appears that he was privy thereto, he is not entitled to recover any advance made by him in connection therewith, or money due him as profits derived therefrom, but when the advances have been made upon a new contract remotely connected with the illegal contract, and the title or right of the party to recover is not dependent upon that contract, and his case may be proved without reference thereto, he is entitled to recover. (Miss.) *Woodson v. Hopkins*, 275.

9. **CONTRACTS—Illegal—Accounting.**—If several persons as coparties enter into an illegal contract which is executed and one of such coparties receives the profits of the contract, the courts will not compel him to account to the other coparties for their share of such profits. (Miss.) *Woodson v. Hopkins*, 275.

10. **CONTRACTS—Illegal—Accounting.**—One party to an illegal contract can have no accounting from the other, where he must call in the aid, directly or indirectly, of the illegal contract to make out his case. (Miss.) *Woodson v. Hopkins*, 275.

11. **CONTRACTS—Illegal—Partners,** no more than others, can enforce contracts against public policy, whether they are executed or merely executory. (Miss.) *Woodson v. Hopkins*, 275.

Intoxication of Party.

12. **CONTRACTS—Intoxication to Avoid.**—A contract entered into by a person while he is so voluntarily intoxicated as not to know what he is doing, and as to dethrone his reason, is void, and he may plead his disability from such drunkenness to defeat the alleged contract. (N. C.) *Cameron-Barkley Co. v. Thornton Light etc. Co.*, 532.

13. **CONTRACTS—Intoxication to Avoid.**—In order to avoid a contract on the ground of intoxication, the person making it must be so drunk at the time as to be incapable of knowing what he was doing. Mere imbecility of mind, or inability to act wisely or discreetly caused by drink, is not sufficient to avoid the contract. (N. C.) *Cameron-Barkley Co. v. Thornton Light etc. Co.*, 532.

CORAM NOBIS.

See Criminal Law, 7, 8.

CORPORATIONS.

In General.

1. **CORPORATIONS—Meetings.**—Individual Stockholders are bound by the action of the majority at corporate meetings of which due notice is given, although such individual stockholders are not represented at such meetings. (Miss.) *Hinds County v. Natchez etc. R. R. Co.*, 305.

2. **CORPORATE RECORDS—Whether Public.**—The books and records which the laws of West Virginia require private corporations to keep are not public records. (W. Va.) *Lipscomb v. Condon*, 938.

3. **CORPORATIONS—Criminal Charge Against—Burden of Proof.** On the trial of an indictment alleging that the defendant is a corporation, the prosecution has the burden of proof to show that fact. (Ind. App.) *Acme Fertilizer Co. v. State*, 190.

Promoters.

4. **CORPORATIONS.**—Promoters cannot Secretly Obtain Profits from the corporation they cause to be organized and launched into

the business world, without being responsible to it therefor. (Wis.) *Pietsch v. Milbrath*, 1017.

5. CORPORATIONS.—Persons Who Act as Promoters of a corporation do not necessarily cease to be such when the corporation is organized to do business, and they may retain their fiduciary relation thereto until its capital stock shall have been taken and the corporation provided with a board of directors, or some reasonably efficient means of protecting its interests, and so long as there are prospective original subscribers for stock and the promoters and those concerting with them remain in control of the corporation, it is in a situation to be deceived, and the promoters retain their fiduciary relation thereto. (Wis.) *Pietsch v. Milbrath*, 1017.

6. CORPORATIONS.—Promoters.—If a corporation has been organized and persons promoting it up to that time continue to act for it by inducing persons to come in and subscribe for its capital stock, their relation as promoters continue. (Wis.) *Pietsch v. Milbrath*, 1017.

7. CORPORATIONS.—Promoters—Liability.—If one or more persons acquire property intending to promote the organization of a corporation to purchase it from them at a profit to themselves, and effect such purpose, limiting the membership to interested parties until the transaction is completed between them and the corporation, intending thereafter to cause the balance of the capital stock to be sold to outsiders who are kept in ignorance of the true nature of the transaction, and they effect such intent, they are guilty of actionable fraud upon the corporation and liable to it for the gains made. (Wis.) *Pietsch v. Milbrath*, 1017.

8. CORPORATIONS.—Promoters—Liability.—All who are concerned in a transaction of buying land at one price to turn it over to a corporation to be formed at a much greater price, and to induce others to come into the corporation in ignorance of the facts, and contributing the actual capital necessary to enable them to fully accomplish their purpose, become liable to refund their profits to the corporation. (Wis.) *Pietsch v. Milbrath*, 1017.

9. CORPORATIONS.—Promoters—Statute of Limitations.—A corporation has a remedy at law to enforce the liability of its promoters to refund to it their unlawful profits, and therefore the statute of limitations runs against the cause of action both of the corporation and that of its stockholders. (Wis.) *Pietsch v. Milbrath*, 1017.

10. CORPORATIONS.—Promoters—Fraud—Statute of Limitations. Except in an action for relief on the ground of fraud in a case cognizable solely in a court of equity, the running of the statute of limitations is not postponed until the discovery by the aggrieved party of the fraud, and the cause of action by a corporation against its promoters to recover unlawful profits obtained by them is not solely cognizable in a court of equity, there being an adequate remedy at law. (Wis.) *Pietsch v. Milbrath*, 1017.

Garnishment of Corporation.

11. CORPORATION, Domicile of.—For the purpose of garnishing a debt due from it a corporation will be deemed to have its domicile in North Carolina, where its principal place of business and its property are in that state, except an office which it has in New Jersey, the state of its incorporation. (N. C.) *Goodwin v. Claytor*, 479.

12. CORPORATION, Situs of for the Purpose of Garnishment.—A debt may be garnished in the state of the debtor's domicile, though the plaintiff and the defendant in the action in which the writ was issued reside in another state. (N. C.) *Goodwin v. Claytor*, 479.

13. GARNISHMENT—Foreign Corporation, When Subject to.—A foreign corporation doing business in North Carolina and complying with its laws respecting such corporations may be there garnished on account of salary due to one of its salesmen on whom process is served by publication, who is a resident of Virginia, and whose services were performed in that state under a contract entered into in North Carolina, such foreign corporation having been incorporated in New Jersey, but merely for the purpose of doing business in North Carolina. (N. C.) *Goodwin v. Claytor*, 479.

14. CORPORATE STOCK—Subjecting by Creditor—Corporation as Garnishee.—In a proceeding by a creditor of a stockholder to subject his shares to the payment of his debt, the corporation may be made the garnishee. (W. Va.) *Lipscomb v. Condon*, 938.

Sale of Franchise and Property.

15. CORPORATIONS—Sale of Franchise.—Stockholders in a corporation which sells its franchise cannot attack the sale for want of power in the purchaser to buy. (Miss.) *Hinds County v. Natchez etc. R. R. Co.*, 305.

16. CORPORATIONS—Sale of Franchise.—Whatever complaint may be made, by creditors of a corporation which sells its franchise, or by stockholders of the purchaser, or by the state, of want of power in the purchaser to buy, this objection cannot be made by the selling corporation or its stockholders. (Miss.) *Hinds County v. Natchez etc. R. R. Co.*, 305.

17. CORPORATIONS—Sale of Franchise and Property by Majority of Stockholders.—A private corporation, doing a losing and unprofitable business, may sell its franchise and entire assets upon a vote of a majority of the stockholders, without the consent of the minority. (Miss.) *Hinds County v. Natchez etc. R. R. Co.*, 305.

18. CORPORATIONS—Sale of Franchise—Estoppel of Stockholder to Attack.—A county which issues bonds to, and holds stock in a railroad and which appoints a representative to act as director in the railroad corporation is bound by his action at a directors' meeting, in participating in the sale of the corporate franchise and assets, and it is estopped to attack or repudiate such sale. (Miss.) *Hinds County v. Natchez etc. R. R. Co.*, 305.

19. CORPORATIONS—Right to Dispose of Property.—A corporation has the same dominion over its corporate property, with the same right of disposition, as a private person has over his. (Utah) *Hearst v. Putnam Mining Co.*, 698.

Capital Stock and Dividends.

20. CORPORATIONS.—Cash Dividends upon corporate stock are to be regarded as income, and pass to the life tenant, while stock dividends are to be treated as capital and go to the remainderman. (Conn.) *Smith v. Dana*, 51.

21. CORPORATIONS.—Capital Stock of a corporation is the fund, property, or other means contributed, or agreed to be contributed, by the shareholders as the financial basis for the prosecution of the business of the corporation, such contribution being made, either directly through stock subscriptions, or indirectly through the declaration of stock dividends. The term "capital" is used to designate that portion of the assets of a corporation, regardless of their source, which is utilized for the conduct of the corporate business and for the purpose of deriving therefrom gains and profits. (Conn.) *Smith v. Dana*, 51.

22. CORPORATIONS.—Undistributed Profits or Surplus of a corporation in any form may be invested in the business of the corporation without thereby becoming "capital stock." Until such profits are effectually and irrevocably dedicated to corporate uses through the medium of a stock dividend, they do not pass beyond the control of the corporate directors, nor cease to be available for distribution as cash dividends to those originally entitled thereto as such. (Conn.) *Smith v. Dana*, 51.

23. CORPORATIONS.—Undistributed Profits of a Corporation, though invested in permanent works, property, improvements, or acquisitions, or business extensions, do not become, by force of that fact permanent additions to the capital stock of the corporation, beyond the recall of the directors to be distributed as cash dividends. (Conn.) *Smith v. Dana*, 51.

24. CORPORATIONS—Dividends.—It is presumed that when a solvent going corporation declares a lawful dividend, it is one to be paid out of profits. (Conn.) *Smith v. Dana*, 51.

25. CORPORATIONS—Cash Dividends—Liquidation.—If undistributed profits of a corporation have been invested in its business for a time, and then converted into money and made payable to stockholders as cash dividends, such transaction, providing the corporation is solvent, is not a liquidation or surrender of a portion of its capital stock. (Conn.) *Smith v. Dana*, 51.

26. CORPORATIONS—Transfer of Stock.—Unpaid Dividends accruing after demand made for the transfer of stock upon the books of a corporation are an incident to the stock and follow it. (Vt.) *White River Savings Bank v. Capital Savings Bank etc. Co.*, 754.

Corporate Stock and Certificates.

27. CORPORATE STOCK—Nature of Property in.—Shares of stock in a corporation, although incorporeal in their nature, are personal property. (W. Va.) *Lipscomb v. Condon*, 938.

28. CORPORATE STOCK.—A Certificate of Stock is authentic evidence of the title to stock, but it is not the stock itself, nor is it necessary to the existence of the stock. (W. Va.) *Lipscomb v. Condon*, 938.

29. CORPORATE STOCK—Stock Certificates.—Under the statutes of West Virginia a certificate of stock need not be issued to a shareholder unless he demands it. He may transfer his shares without having a certificate, but if he accepts one he is placed under certain restrictions as to the mode of transfer. (W. Va.) *Lipscomb v. Condon*, 938.

30. CORPORATE STOCK—Whether Subject to Execution.—Shares of stock in a corporation are not subject to execution at the common law, but they are under the statutes of West Virginia. (W. Va.) *Lipscomb v. Condon*, 938.

Stock Held by County.

31. CORPORATIONS.—Counties Which Issue Bonds for Railroad Stock do not hold and own the stock given therefor, in a governmental capacity, but hold it in the same way, and subject to the same rights and obligations, as private corporations or individuals. (Miss.) *Hinds County v. Natchez etc. R. R. Co.*, 305.

Watered Stock.

32. CORPORATIONS—Watered Stock, Persons Acting with Knowledge of.—One who knew when he became a creditor of a cor-

poration that its stock had been watered, and issued without the payment of its par value, is not entitled to recover from a stockholder the amount of the subscribed value of such stock remaining unpaid. (Mo.) Colonial Trust Co. v. McMillan, 335.

33. CORPORATIONS, Watered Stock, What is.—Stock for the purpose of consolidating the franchises, property, and business of two corporations, both of which are heavily indebted and insolvent, is watered stock. (Mo.) Colonial Trust Co. v. McMillan, 335.

Sale or Transfer of Stock.

34. CORPORATIONS—Sale of Stock—Estoppel of Stockholder to Attack.—If a county owns a majority of the stock of a railroad and controls its management for a long period of years, being represented by its agent at every stockholders' meeting, and participating such agent, in the issuance and sale of stock, it is estopped to question the validity of the stock so issued and sold, in the hands of the purchaser or holder thereof. (Miss.) Hinds County v. Natchez etc. R. R. Co., 305.

35. CORPORATE STOCK—Transfer Without a Certificate.—A share of stock may be assigned without a stock certificate. (W. Va.) Lipscomb v. Condon, 938.

36. CORPORATE STOCK—Informal Assignment.—A transfer of corporate stock for which no certificate has been issued may be evidenced by an informal written instrument delivered to the transferee. (W. Va.) Lipscomb v. Condon, 938.

37. CORPORATE STOCK—Mode of Transfer.—If the statutes prescribe no mode for the sale of stock when no certificate has been issued, the owner may dispose of his shares in such manner as would pass his title to any other chose in action or intangible property. (W. Va.) Lipscomb v. Condon, 938.

Registration of Transfer.

38. CORPORATE BOOKS—For Whose Protection Intended.—The statutes of West Virginia requiring corporations to keep transfer-books in which the shares shall be assigned, are intended for the convenience and protection of the corporation and its shareholders. (W. Va.) Lipscomb v. Condon, 938.

39. CORPORATIONS—Transfer of Stock—Duty to Record.—Although a corporation charter provides that its stock shall be transferred only upon its books, and that no transfer shall be valid until the assignor shall have paid all debts due from him to the corporation, yet the corporation cannot refuse to record a transfer of stock when it has notice thereof before the assignor becomes indebted to it. (Vt.) White River Sav. Bank v. Capital Sav. Bank etc. Co., 754.

40. CORPORATE STOCK—Unregistered Transfer—Attachment.—A bona fide transfer of stock for which no certificate has been issued, though not registered on the books of the corporation, vests in the transferee a title superior to the claim of a subsequent attaching creditor of the transferrer. (W. Va.) Lipscomb v. Condon, 938.

Pledge of Stock.

41. CORPORATIONS—Stock—Transfer as Collateral—Title of Holder Before Registry.—The holder of a certificate of stock in a corporation assigned to him as collateral security by indorsement with power of attorney in blank to make transfer on the corporation books has the equitable interest and legal title of the assignor, though as

poration that its stock had been watered, and issued without the payment of its par value, is not entitled to recover from a stockholder the amount of the subscribed value of such stock remaining unpaid. (Mo.) Colonial Trust Co. v. McMillan, 335.

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against the corporation, bona fide purchasers, and creditors of the assignor, unaffected with notice, the transaction is incomplete until the transfer is actually made on the books of the corporation. (Vt.) *White River Savings Bank v. Capital Savings Bank etc. Co.*, 754.

42. CORPORATIONS—Transfers of Stock—Actual Notice.—The record of a transfer of stock on the books of the corporation is required for notice merely, and anyone having actual notice of such transaction and transfer can stand in no better relation to it than he would if it were completed of record. (Vt.) *White River Savings Bank v. Capital Savings Bank etc. Co.*, 754.

43. CORPORATIONS—Pledge of Stock—Property in.—If the legal title to corporate stock is transferred to a pledgee as collateral security, he takes only a special property therein; and the general property remains in the pledgor, which gives the corporation a lien thereon for money advanced to him after notice of the pledge, subject to the lien of the latter. (Vt.) *White River Savings Bank v. Capital Savings Bank etc. Co.*, 754.

44. CORPORATIONS—Pledge of Stock as Collateral Security—Remedy of Pledgee.—When neither the time of redemption nor the manner and time of sale are specified in a contract pledging corporate stock as collateral security, and the corporation issuing the stock claims a prior lien thereon, the pledgee may maintain a bill in equity against the corporation to enforce the pledge. (Vt.) *White River Savings Bank v. Capital Savings Bank etc. Co.*, 754.

45. CORPORATIONS, Pledge of Stock, What is.—Though stock is issued by a corporation directly to the person named therein as holder, yet if it was issued to him to secure the performance of an agreement, he is a pledgee, and not a stockholder, and cannot be held liable to a creditor of the corporation on the ground that the certificate falsely recited that it was fully paid. (Mo.) *Colonial Trust Co. v. McMillan*, 335.

46. CORPORATIONS—Pledgee, Character of not Changed by His Demanding Resignation of Officers.—Where stock was issued by a corporation to secure the performance of an agreement, the person named therein is not deprived of his right to insist that he is a pledgee only, by the fact that he demanded and received the resignation of all the officers and directors of the corporation, if he never at any time acted in the capacity of a shareholder. (Mo.) *Colonial Trust Co. v. McMillan*, 335.

47. CORPORATIONS—Pledgee of Stock, When not Converted into a Stockholder by a Forfeiture Agreement.—A clause in an agreement to the effect that if a person who is a pledgee of stock is not relieved from specified responsibility in the time designated, the stock is to become his, does not, on the happening of the contingency referred to, under the laws of New York, acquire the title to the stock so pledged, nor subject himself to the liability of a stockholder. (Mo.) *Colonial Trust Co. v. McMillan*, 335.

48. CORPORATIONS—Pledgee of Stock, Liability of.—A pledgee of stock, though it was issued to him directly and stands in his name on the books of the corporation, is not liable to an action brought by a creditor of the corporation on the ground that the stock has been fully paid. (Mo.) *Colonial Trust Co. v. McMillan*, 335.

Pledge of Stock—Laches and Limitations.

49. CORPORATIONS—Pledge of Stock—Laches in Enforcing.—If a corporation's lien on certain of its stock attaches within less than three years and one-half, after it has received notice of the pledge of

COSTS.

1. **COSTS.**—In Interpleader Proceedings respecting a sum of money in the hands of the plaintiff, he is entitled to a decree for costs out of the fund, and the defendant not in fault is entitled to a decree against the other defendant for the costs so taken out of the fund, as well as for his own costs. (W. Va.) *Swiger v. Haymar*, 899.

2. **COSTS** will be Awarded to Defendant when in an equity action he prevails as to the entire cause of action set forth in the complaint. (Wis.) *Pietsch v. Milbrath*, 1017.

3. **COSTS**—Apportionment.—In the Absence of Some Statutory provision authorizing it, costs in actions at law cannot be apportioned. (Utah) *Freed Furniture etc. Co. v. Sorensen*, 731.

4. **COSTS**—Apportionment in Replevin.—Where one section of the statutes provides that costs are allowed of course to the prevailing party, among others, in an action to recover the possession of personal property, and another section gives the court discretion to apportion costs in all other actions than those mentioned in the prior section, the court has no discretion to apportion costs when the plaintiff in an action for the possession of goods recovers only a portion of them, but must allow them as a matter of course to the prevailing party. (Utah) *Freed Furniture etc. Co. v. Sorensen*, 731.

COTENANCY.

See Tenants in Common.

CRIMINAL LAW.*In General.*

1. **CRIMINAL TRIAL**—Motion for a New Trial—Excessive Sentence.—That the court in sentencing the defendant disregarded the recommendation of the jury, and that the sentence is therefore excessive, is not a proper matter for a motion for a new trial. (Ga.) *Mixon v. State*, 149.

2. **CRIMINAL LAW**—Character of the Accused.—Where the general character of the accused is not attacked nor put in issue, there is no error in refusing to charge that his character was presumed to be good unless shown to be otherwise. (Ga.) *Mixon v. State*, 149.

3. **THREATS.**—Words or Acts which are calculated and intended to cause an ordinary person to fear an injury to his person, business, or property, are equivalent to threats. (Conn.) *State v. Stockford*, 28.

Instructions.

4. **CRIMINAL LAW**—Instruction to Jury, Refusal of.—It is not error to refuse an instruction employed in the head-note of a decision made by the supreme court in another case showing that the charge given in such case by the trial court was erroneous. (Ga.) *Mixon v. State*, 149.

5. **CRIMINAL LAW**—Instruction Regarding the Danger of Punishing Innocent Persons.—An instruction to the effect that it is a well-established maxim of law that it is better to let a hundred guilty persons go unpunished than to punish one innocent is properly refused. (Ga.) *Mixon v. State*, 149.

6. **CRIMINAL LAW**—Instruction that Conviction of One of Two Persons Jointly Indicted Creates No Presumption Against the Other. If the state during the trial of a person accused of crime proves

that a person jointly indicted with him has been convicted, it is error to refuse to the charge the jury that where several are jointly indicted, the conviction creates no presumption of guilt as to any of the others. (Ga.) *Mixon v. State*, 149.

Writ of Error Coram Nobis.

7. **WRIT OF ERROR** Coram Nobis is Applicable and may issue in criminal as well as civil proceedings in a proper case. (Miss.) *Fugate v. State*, 268.

8. **WRIT OF ERROR** Coram Nobis cannot be Invoked in a criminal case for the purpose of revoking the judgment by showing that jurors had formed or expressed opinions unfavorable to the accused. (Miss.) *Fugate v. State*, 268.

COURTESY.

See Partition, 4.

DAMAGES.

1. **DAMAGES in Personal Injury Cases**—Instruction, When not Prejudicial.—An instruction in a suit for personal injuries that the plaintiff may be allowed compensation for time lost and for diminished earning capacity, and given such sum as the jury may believe to be fair and just for any loss which he has sustained in the past or may sustain, in his future condition by reason of such diminished earning capacity as may be occasioned by his injury, is not to be construed as meaning that he is to be compensated for both loss of time and wages in the same past and future period. (Mo.) *Reynolds v. Transit Co.*, 360.

2. **JURY TRIAL**—Damages, When Excessive.—An award by the jury of twenty-three thousand four hundred dollars as damages for personal injury was held to be excessive and reduced by the court to fifteen thousand dollars, where the plaintiff's testimony was to the effect that he was at the time of the injury forty-two years of age, strong and healthy, that he was thrown on his back, receiving a painful injury, and has never been able to stand or walk since, and has lost forty or fifty pounds, and is required constantly to take purgatives, and has diabetes and paralysis of both legs and manifestations of progressive nervous decay, and is a helpless cripple with little hope of improvement; while the expert testimony on the part of the defendant was to the effect that his injuries were less severe than represented, the condition of his legs due to hysterical anasthesia, and that there was no evidence of diabetes. (Mo.) *Reynolds v. Transit Co.*, 360.

3. **JURY TRIAL**—Inadequate Verdict for Personal Injuries.—Where a woman, sixty-eight years of age, suffers personal injuries by reason of a defect or obstruction in a public street, and brings against the city an action in which it is shown that her ankle was broken and dislocated, wherefrom she was confined to her bed for several months and suffered the pain and discomfort usually incident to such an injury, and remained a cripple, able to walk only by artificial aid up to the time of the trial, a verdict of the jury finding all the issues in her favor, but fixing her damages at one dollar will be set aside. It cannot be construed as in effect a finding for the defendant. (Mo.) *Fischer v. St. Louis*, 380.

4. **DAMAGES**—Verdict for Immoderately Small Sum.—The court in an action to recover for personal injuries due to the defendant's negligence may set aside a verdict because immoderately small, as

where under the evidence it must be attributed to whim, arbitrariness, or a disposition to play fast and loose with the law and the substantial rights of the appellant. (Mo.) *Fischer v. St. Louis*, 380.

5. **DAMAGES, When not Excessive.**—A verdict for three thousand dollars where, through the negligence of the defendant, the large bone in the plaintiff's leg was broken and she was rendered bedridden for ten months and up to the date of the trial, and was then still suffering, and where expert evidence shows that her injury will always give her trouble, is not excessive. (Mo.) *Connor v. City of Nevada*, 314.

See Negligence; Release; Sales.

DECLARATIONS.

See Evidence; Wills.

DEEDS.

Acknowledgment.

1. **DEEDS—Copy as Evidence—Seal.**—A copy of a deed is admissible in evidence, although it has the word "seal" after the notary's signature to the acknowledgment instead of words to indicate it as his official seal, when the notary certifies the certificate to be under his "official seal." (W. Va.) *Wilson v. Braden*, 927.

2. **DEEDS.**—Where an Officer in Taking an Acknowledgment signs the certificate as justice of the peace and alderman, the word "alderman" may be regarded as surplusage, the words "justice of the peace" being in accordance with law. (W. Va.) *Wilson v. Braden*, 927.

Restraint of Alienation.

3. **CONVEYANCE—Invalid Condition.**—To an absolute conveyance in fee a clause providing that the grantee shall not dispose of or mortgage the property is repugnant and void. (Mo.) *Kessner v. Phillips*, 368.

4. **CONVEYANCE.**—Condition That the Land Conveyed Shall not be Subject to the Grantee's Debts is a restraint of alienation and void. (Mo.) *Kessner v. Phillips*, 368.

5. **CONVEYANCE—Alienation, Attempt to Restrain Power of for a Limited Period.**—If a conveyance in fee contains a condition that the grantee shall not convey or encumber the property for thirty years, and if he attempts to do so, that it shall vest in the grantor, the condition is void. (Mo.) *Kessner v. Phillips*, 368.

See Constitutional Law, 1; Notice.

DEFINITIONS.

See Words and Phrases.

Note.

Definition of nuisance, 199.

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DENTISTS.

See Physicians and Surgeons.

EMINENT DOMAIN.*In General.*

1. **EMINENT DOMAIN—Municipalities.**—The legislature cannot empower corporations to appropriate private property without compensation, nor can it authorize a city to do so. (N. C.) *Brown v. Asheville Electric Co.*, 554.

2. **EMINENT DOMAIN—Damages for Property Already Dedicated as a Public Street.**—In proceedings to acquire as a right of way for a railroad the whole of a public street, the defendants, who are abutting owners, having already dedicated it as such, are entitled to the full value of the land taken without any deduction being made on account of such previous dedication. (N. C.) *Suffolk etc. Ry. Co. v. West End Land etc. Co.*, 490.

Public Use.

3. **EMINENT DOMAIN—Public Use.**—What Shall be Considered a public use often depends somewhat upon the locality, the wants and necessities of the people, the conditions with which they are surrounded, and the character of the natural resources of the locality or commonwealth. (Utah) *Highland Boy Gold Min. Co. v. Strickley*, 711.

4. **EMINENT DOMAIN—Public Use.**—When the Legislature has declared a use to be public, its declaration will be respected and followed by the courts, unless the act is clearly unconstitutional, or the necessity for the taking is plainly without reasonable foundation. (Utah) *Highland Boy Gold Min. Co. v. Strickley*, 711.

5. **EMINENT DOMAIN—Public Use—Tramways for Mining.**—The construction and operation of roads and tramways for the development and working of mines is a public use. (Utah) *Highland Boy Gold Min. Co. v. Strickley*, 711.

6. **CONSTITUTIONAL LAW—Public Use.**—Whether a given taking of private property is a taking for public use can always be investigated in the courts, no matter what may have been the action of the legislature concerning it. (Tex.) *Borden v. Trespalacios Rice etc. Co.*, 640.

7. **CONSTITUTIONAL LAW—Public Use.**—Private property is taken for a public use only when there results to the public some definite right or use in the business or undertaking to which the property taken is devoted, and such public right or use must result from the law itself and not be dependent entirely upon the will of the donee of the power. (Tex.) *Borden v. Trespalacios Rice etc. Co.*, 640.

8. **CONSTITUTIONAL LAW—Public Use—How Determined.**—If it can be gathered from all the provisions of a statute that the recipient of the power to take private property is charged with duties to the public, or that a right of use in that for which the property taken is secured to the public, the manner in which, or the form of expression by which, it is done, is immaterial, as the courts cannot inquire into the wisdom or expediency of the regulations adopted by the legislature for the protection of the public, further than to see that a public use is secured. (Tex.) *Borden v. Trespalacios Rice etc. Co.*, 640.

9. **CONSTITUTIONAL LAW—Public Use—How Determined.**—The question whether a public use springs from a law granting the right of eminent domain to a corporation is largely influenced by the character of the franchise granted to it and the business it is authorized to carry on. (Tex.) *Borden v. Trespalacios Rice etc. Co.*, 640.

10. CORPORATIONS—Irrigation—Eminent Domain.—A corporation organized for the construction of canals and for the declared purpose of irrigation, milling, navigation and stockraising, under authority of a statute allowing corporations to be formed for such purposes, has authority to condemn private property for the construction of a canal for irrigation purposes. (Tex.) *Borden v. Trespalacios Rice etc. Co.*, 640.

Evidence of Value of Land.

11. EMINENT DOMAIN—Evidence Tending to Show Value of Land Taken.—Evidence that there is an improved street near the land sought to be condemned on which residences of good size and quality have been erected is properly received, because it tends to show the value of the lands which are the subject of the proceeding. (N. C.) *Suffolk etc. Ry. Co. v. West End Land etc. Co.*, 490.

12. EVIDENCE, Tax List as.—A tax list is not admissible for the purpose of showing the value of the property sought to be taken in proceedings in the exercise of the right of eminent domain. (N. C.) *Suffolk etc. Ry. Co. v. West End Land etc. Co.*, 490.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

EQUITY PRACTICE—Attachment—Jury Trial.—When, under section 23 of chapter 106 of the Code of West Virginia, a petition is filed in a suit in equity founded upon an attachment, setting up title by purchase, and fraud in the alleged purchase is relied upon to defeat the claim of title so set up, the trial of the issue must be upon the petition without other pleadings, and by a jury unless waived. (W. Va.) *Lipscomb v. Condon*, 938.

ESTATES OF DECEDENTS.

See Dower.

Note.

Estoppel, public nuisance, whether right to maintain can be created by, 218.

EVIDENCE.

In General.

1. EVIDENCE Controlled by the Pleadings.—Where the pleadings in a case allege and admit that a judgment obtained therein is final, evidence is not admissible to show that it is not so because motions for a new trial and in arrest of judgment have been made and remain undisposed of. (Mo.) *Kessner v. Phillips*, 368.

2. EVIDENCE.—**Erroneous Admission of Evidence is Jured** by expressly withdrawing from the jury any consideration of the issue upon which it was introduced. (Wash.) *Yakima Valley Bank v. McAllister*, 823.

Ancient Deed.

3. ANCIENT DEEDS.—**Recitals of Heirship and widowhood** in deeds over thirty years old, under which possession has been continuously held, are presumptive evidence of the truth thereof and admissible against strangers to the title. (W. Va.) *Wilson v. Braden*, 927.

Law of Another State.

4. **LAW OF ANOTHER STATE, Presumption Respecting.**—If the law of another state is not pleaded, it will be presumed that the common law is in force there. (Ga.) *Bailey v. Devine*, 153.

5. **STATUTES of Another State—Construction of Opinion of Lawyer.**—A lawyer or person learned in the law of another state is incompetent to give his opinion as to the "consensus of opinion of the bench and bar" of such state as to the meaning of one of its statutes when the text of such statute is before the court. (Wash.) *Clark v. Eltinge*, 858.

Books, Records, and Entries.

6. **EVIDENCE—Time-books.**—If one person claims to have been in the employ of another at a certain time, the time-book of the latter is not admissible in evidence to show such claim to be untrue. The knowledge of the owner of the time-book is the primary and best evidence when he is able to testify to the fact. (Wash.) *Conover v. Neher-Ross Co.*, 841.

7. **EVIDENCE.**—Records of Entries Made in the usual course of business based upon reports made by one whose duty it is to make such reports, but who is not required to make and keep any record of the transaction, are admissible in evidence upon the ground of necessity. (N. C.) *Fireman's Ins. Co. v. Seaboard Air Line Ry.*, 517.

8. **EVIDENCE—"Train Sheets."**—Records of entries made in the usual course of business on "train sheets" by a train dispatcher from reports telegraphed to him by station agents as to the arrival and departure of trains are admissible in evidence to show the position and place of a train at a certain time. (N. C.) *Fireman's Ins. Co. v. Seaboard Air Line Ry.*, 517.

9. **EVIDENCE.**—Entries Made by One Whose Duty It is to Make Them in the general course of business are admissible after his death. This rule applies in the case of an agent who makes such entries in the course of the business of his principal. (Ga.) *Turner v. Turner*, 76.

Declarations—Agents—Deceased Persons.

10. **EVIDENCE.**—Declarations Against Interest by One Since Deceased are admissible in a controversy between third persons. (Ga.) *Turner v. Turner*, 76.

11. **EVIDENCE.**—Declarations of an Agent are not Admissible Against His Principal, unless made when the agent is engaged in some transaction within the scope of his agency and acting on behalf of his principal. The declaration must be one accompanying an act within the scope of the agency and so nearly connected therewith as to be a part of the *res gestae*. (Ga.) *Turner v. Turner*, 76.

12. **EVIDENCE.**—Declarations of Deceased Agent—Rule of the Georgia Code.—Section 3034 of the Civil Code of Georgia providing that the declarations of an agent as to business transacted by him are not admissible against his principal, unless they are part of the negotiation, and constituting the *res gestae*, or else the agent be dead, are simply declaratory of the pre-existing law upon the subject, and do not make such declarations admissible in evidence in every case after the death of an agent, but only in those cases in which they were admissible before the adoption of the code. (Ga.) *Turner v. Turner*, 76.

13. **EVIDENCE.**—If the Declarations of a Deceased Person are Admissible in Evidence as Against His Interest, they must be dealt with

as if the witness were on the stand testifying to the facts stated in the declaration. (Ga.) *Turner v. Turner*, 76.

14. EVIDENCE—Communications to an Attorney at Law when Acting as a Loan Agent.—An attorney at law, who is also the agent of a loan company, and expected as such to see that an applicant for a loan has an unencumbered title, and to do other acts which are necessary and proper to secure the acceptance of a loan, is to be regarded merely as an agent of the applicant, selected as such because he is an attorney at law, and he may be permitted to testify to conversations in his presence between such applicant and her husband in reference to a claim, the payment of which they proposed to make out for the proceeds of the loan. (Ga.) *Turner v. Turner*, 76.

15. EVIDENCE—Antecedent Declarations.—If Testimony is Assailed as a fabrication of recent date, the imputation may be repelled by proof of the antecedent declarations of the witness. (Wash.) *Conover v. Neher-Ross Co.*, 841.

Res Gestae.

16. EVIDENCE—Res Gestae.—If a trespasser is wrongfully ejected from a freight train, his statement, made five minutes afterward and while in great pain, as to the manner in which he was ejected from the train, is admissible in evidence as part of the *res gestae*. (Wash.) *Dixon v. Northern Pac. Ry. Co.*, 810.

17. EVIDENCE—Res Gestae—Hearsay.—A statement made by a stranger at the time and place of an accident, as to the manner in which it occurred is not admissible in evidence as part of the *res gestae*, but is mere hearsay, in the absence of any showing that he was prompted by the circumstances to tell the truth. (Wash.) *Dixon v. Northern Pac. Ry. Co.*, 810.

Opinion Evidence.

18. EVIDENCE—Opinion.—Any Subject wherein a person may become specially learned or skilled is within the broad field of opinion evidence, and it is not confined to mere matters of professional or scientific knowledge. (Wis.) *Northern Supply Co. v. Wingard*, 984.

19. EVIDENCE—Opinion.—A witness specially qualified in that regard is competent to state whether in his opinion potatoes delivered under a contract of sale were of "good sound white stock." (Wis.) *Northern Supply Co. v. Wingard*, 984.

20. EVIDENCE—Opinion—Materiality.—If a written contract of sale calls merely for the delivery of "good" potatoes, opinion evidence as to whether those delivered were of "good sound white stock" is immaterial. (Wis.) *Northern Supply Co. v. Wingard*, 984.

Failure to Produce Books—Suppression.

21. EVIDENCE—Failure to Produce Books and Papers—Presumption.—If a defendant, after having been duly notified to produce books and papers at the trial, fails or refuses to do so, it may be presumed that such failure or refusal is because such books and papers, if produced, would operate against his claim and in favor of the claim of the plaintiff. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

22. EVIDENCE—Suppression of—Presumption.—If the defendant suppresses evidence which he has been duly called upon to produce, it may be presumed that plaintiff's claim upon such evidence is true, and that defendant's claim thereon is false. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

Spoliation of Evidence.

23. **EVIDENCE—Spoliation of—Presumption.**—The spoliation of evidence raises the presumption that it is against the person guilty of the act of spoliation, but such presumption does not relieve the other party from introducing evidence tending affirmatively to prove his case in so far as he has the burden of proof. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

EXECUTIONS.

1. **EXECUTIONS—Supplementary Proceedings—Judicial Notice of Record.**—A proceeding supplementary to execution is merely auxiliary to the original action, and the court will take judicial notice of the entire record. (Wash.) *Flood v. Libby*, 851.

2. **EXECUTION—Supplementary Proceedings—Sufficiency of Affidavit.**—If the record shows the entry of judgment, issue of execution, and its return unsatisfied, and fifteen days subsequently thereto an affidavit in a proceeding supplementary to execution is filed, stating that the judgment debtors have property which they refuse to apply to the satisfaction of the judgment, that they are in receipt of large salaries, own life insurance policies, having large cash withdrawal values, and have real estate interests of unknown value and nature, and that plaintiff believes that they will secrete and dispose of their property, such affidavit is sufficient to give the court jurisdiction to require defendants to appear and answer concerning their property and to restrain them from disposing of it. (Wash.) *Flood v. Libby*, 851.

3. **EXECUTIONS—Supplemental Proceedings—Receivers.**—The appointment of a receiver in proceedings supplemental to execution will not be disturbed on appeal, when the court finds generally that the judgment debtor is unjustly withholding property, although an order for the delivery of certain exempt property to the receiver is erroneous, and must be reversed. (Wash.) *Flood v. Libby*, 851.

See Exemptions; Homestead, 3.

EXEMPTIONS.*In General.*

1. **EXECUTION.—Exemption Laws are Liberally Construed** and so as to embrace all persons coming fairly within their scope. (N. C.) *Goodwin v. Claytor*, 479.

2. **EXECUTION—Exemption Laws, Construction of.**—Where an exemption is allowed in supplemental proceedings, it must be deemed to extend to garnishment and all other proceedings having for their object the taking of the property of the debtor and applying it to the satisfaction of his creditor. (N. C.) *Goodwin v. Claytor*, 479.

3. **EXECUTION—Exemption.—The Earnings of a Debtor for His Personal Services** at any time within sixty days preceding a garnishment are exempt therefrom. (N. C.) *Goodwin v. Claytor*, 479.

Insurance Moneys.

4. **EXEMPTIONS—Endowment Insurance Policies.**—A statute exempting the proceeds of all life and accident insurance policies from all liability for any debt applies to an endowment or investment policy, payable to the insured or his estate, and having a present cash surrender value. (Wash.) *Flood v. Libby*, 851.

5. **EXEMPTIONS—Insurance Policies—Conflict of Decisions.**—A decision by a national court that the national bankruptcy act sub-

jects all life insurance policies to the payment of debts does not affect the status of such a policy as being exempt under a state statute, when an attempt is made to enforce a debt under the state law. (Wash.) *Flood v. Libby*, 851.

Conflict of Laws.

6. EXECUTION.—Exemption Laws Have No Extraterritorial Effect. Hence, in an action in North Carolina the exemption laws of Virginia cannot be relied on, though the plaintiff and the defendant are residents of that state. (N. C.) *Goodwin v. Claytor*, 479.

7. CONFLICT OF LAWS—Exemptions.—If, by the laws of one state the wife is liable for the debt of her husband while a resident of that state, the only exemption to which she is entitled upon changing her residence to another state is that provided by the law of the latter state. (Wash.) *Clark v. Eltinge*, 858.

See Garnishment, 4.

FALSE IMPRISONMENT.

1. FALSE IMPRISONMENT.—Every restraint upon a man's liberty is, in the eye of the law, an imprisonment and if not justifiable is false imprisonment. (Vt.) *Goodell v. Tower*, 745.

2. ARREST—Process—Justification.—In criminal proceedings the complaint and warrant constitute the precept, and when the complaint shows on its face that the justice of the peace who signed the warrant of arrest had no authority to issue it, the officer who served it cannot justify thereunder. (Vt.) *Goodell v. Tower*, 745.

3. FALSE IMPRISONMENT—Arrest Under Void Process.—An officer is liable for false imprisonment when the process under which the arrest and imprisonment are made is absolutely void for want of jurisdiction in the magistrate issuing it, or for other cause. (Vt.) *Goodell v. Tower*, 745.

4. FALSE IMPRISONMENT.—All Persons Aiding and Assisting in the unlawful confinement of another are liable in damages for the false imprisonment, although they had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful at the time they had a hand in it. (Vt.) *Goodell v. Tower*, 745.

5. FALSE IMPRISONMENT.—Any person who aids or abets an unlawful arrest is liable for a false imprisonment. (Vt.) *Goodell v. Tower*, 745.

6. FALSE IMPRISONMENT—Damages.—A person suing for a false imprisonment is entitled to compensation for loss of time, and for mental suffering without special allegation. (Vt.) *Goodell v. Tower*, 745.

7. FALSE IMPRISONMENT—Arrest—Warrant Without Jurisdiction—Personal Liability of Magistrate.—If a justice of the peace or other inferior magistrate acts without his jurisdiction in issuing a warrant of arrest to the injury of the person arrested thereunder, the magistrate is personally liable for false imprisonment. (Vt.) *Goodell v. Tower*, 745.

8. FALSE IMPRISONMENT—Arrest.—It is not necessary to an arrest, to support an action for false imprisonment, that the officer should lay hands upon the person arrested, as it is sufficient if he was within the power of the officer and submitted to the arrest. (Vt.) *Goodell v. Tower*, 745.

FELLOW-SERVANTS.

See Master and Servant, 4-9.

FIRE LIMITS.

See Municipal Corporations, 2-5.

FIRES.

See Railroads, 2.

FIXTURES.

See Injunctions, 1.

FOLGERY.

See Banks and Banking; Cancellation of Instruments.

FRAUD.

1. **FRAUD—Evidence of.**—It is competent to show a general scheme to defraud, so connected with the case under consideration, by time and circumstance, that it will have a tendency to raise the presumption that the fraud charged was a part of the general scheme so proven. (Wash.) *Yakima Valley Bank v. McAllister*, 823.

2. **FRAUD—False Representations—Knowledge.**—If a person states as true, as of his own knowledge, material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know that his representations were false, or that he believed them to be true. (Wash.) *Lawson v. Vernon*, 880.

FRAUDS, STATUTE OF.

1. **FRAUDS, STATUTE OF, Name of the Party to be Charged Appearing Only in the Body of the Receipt.**—If the name of the party to be charged appears in the memorandum, so as to be applicable to the whole substance of the writing, and was written by him or his authorized agent, it is immaterial where in the instrument the name happens to be placed, whether at the top or at the bottom, or merely mentioned in the body of the memorandum. (N. C.) *Hall v. Misenheimer*, 474.

2. **FRAUDS, STATUTE OF, Writing of Name of Party at His Direction.**—If the name of a party is written in a memorandum at his direction, he is bound. It is not material that such direction was by parol. (N. C.) *Hall v. Misenheimer*, 474.

3. **FRAUDS, STATUTE OF—Memorandum, Sufficiency of.**—To charge a party by a contract, the memorandum or other writing relied on must contain expressly or by implication all the material terms of the agreement. (N. C.) *Hall v. Misenheimer*, 474.

4. **FRAUDS, STATUTE OF.—The Doctrine of Part Performance is not Recognized by the Courts of North Carolina.** The fact that a purchaser of real property paid a small amount on the purchase price and took possession does not render the contract enforceable against him when there is no sufficient memorandum in writing thereof. (N. C.) *Hall v. Misenheimer*, 474.

5. **FRAUDS, STATUTE OF.—The Party to be Charged is the defendant in the action, or the one against whom it is sought to en-**

force the obligation of the contract. (N. C.) *Hall v. Misenheimer*, 474.

6. STATUTE OF FRAUDS—Memorandum, When Must Show the Price to be Paid.—In an action against an alleged vendee of real property to recover the purchase price, such price must appear from the memorandum, and cannot be established by parol. (N. C.) *Hall v. Misenheimer*, 474.

GARNISHMENT.

In General.

1. GARNISHMENT, Lien of, When not Lost by the Taking of Judgment Against the Defendant.—The lien acquired by the garnishment of a debt due the defendant is not lost by taking judgment against the defendant and the garnishee. (N. C.) *Goodwin v. Claytor*, 479.

2. GARNISHMENT of Moneys not Earned nor Due.—Under the code of North Carolina, a judgment against a garnishee may include moneys not earned nor due at the time he was summoned to answer, if they were due when he answered and when the judgment was rendered. (N. C.) *Goodwin v. Claytor*, 479.

3. GARNISHMENT, Limitation upon Creditor's Right of.—The plaintiff in garnishment is substituted merely to the interests of his own debtor, and cannot enforce any claim against the garnishee which the debtor himself, if suing, would not be entitled to enforce. (N. C.) *Goodwin v. Claytor*, 479.

Municipal Corporations.

4. MUNICIPAL CORPORATIONS—Garnishment.—School warrants issued for salaries of school teachers, nor the salary of such teachers, can be seized under execution in supplementary proceedings. Such seizure would in effect amount to a garnishment of a municipal corporation. (Wash.) *Flood v. Libby*, 851.

See Corporations, 11-14.

HABEAS CORPUS.

See Adoption.

HEALTH.

Boards of Health.

1. HEALTH BOARD—Powers.—An act done by a board of health, by virtue of statutory authority has, within the board's jurisdiction, the force of an act of the legislature, the whole authority of the state being included and delegated. (Ind. App.) *Anable v. Board of Commrs., etc.*, 173.

2. HEALTH BOARD—Powers—Invasion of Private Rights.—While the act of a board of health is generally legislative, and not subject to review by the courts, yet personal and property rights cannot be arbitrarily stricken down by such board under the guise of the police power, and if such rights are thus invaded, the act is subject to review by the courts. (Ind. App.) *Anable v. Board of Commrs., etc.*, 173.

Employment of Nurses.

3. HEALTH BOARD—Powers—Employment of Nurse.—A board of health having authority to take prompt action in all cases to arrest the spread of contagious or infectious diseases, has power

to employ nurses to attend persons afflicted with such diseases, and the salary for the services of such nurses is a proper charge against the municipality. (Ind. App.) *City of Frankfort v. Irvin*, 179.

4. HEALTH BOARD—Powers—Employment of Nurse Through Committee.—A city board of health, in the employment of a nurse to attend persons afflicted with contagious disease, acts in a ministerial capacity; and if it acts through the agency of a committee or other person authorized, the act is no less binding than if done by the board or the city itself. (Ind. App.) *City of Frankfort v. Irvin*, 179.

Expense of Preventing Spread of Disease.

5. HEALTH—Contagious Diseases—Expense of Preventing Spread of.—The fact that it is the duty of the overseer of the poor and not of the city proper, to make provision for the indigent poor, does not relieve the city from liability for necessary nursing expenses incurred by it in preventing the spread of a contagious or infectious disease. (Ind. App.) *City of Frankfort v. Irvin*, 179.

Expense of Burial.

6. HEALTH—Contagious Disease—Expenses of Burial.—A city may legally contract to pay for the services of a person who assists in the burial of one who has died from the effect of a contagious disease while under the control and charge of the city board of health. (Ind. App.) *City of Frankfort v. Irvin*, 179.

Erection of Pesthouse.

7. HEALTH—Nuisance—Pesthouse.—The erection of a pesthouse as a public necessity is legal, and not a nuisance per se. A right of action may arise if such house is negligently or wrongfully conducted. (Ind. App.) *Anable v. Board of Commrs., etc.*, 173.

8. HEALTH BOARD—Powers—Taking of Private Property—Pesthouse.—If a board of health provides for the erection of a pesthouse, and such erection destroys the value of private property and amounts to a taking thereof, such act cannot be permitted to stand, unless shown to have been expressly authorized. The distinction must be kept in view between the exercise of the police power whereby private property, contaminated with a dangerous disease is summarily destroyed, and that whereby private property, itself not dangerous to the public, is directly injured. The latter act cannot be legally done. (Ind. App.) *Anable v. Board of Commrs., etc.*, 173.

9. HEALTH BOARD—Pesthouse—Exercise of Police Power—Taking Private Property.—If a private person's property has been injured or destroyed by the act of a board of health in erecting a pesthouse, it is no defense that such act was done in the exercise of the police power for the preservation of the public health. To constitute a defense to such act, a proper exercise of the police power must be shown, and in determining the question, regard must be had to the locality of such pesthouse, the present necessities of the particular case, and all other pertinent facts and circumstances. (Ind. App.) *Anable v. Board of Commrs., etc.*, 173.

10. HEALTH BOARD—Erection of Pesthouse—Justification.—If a board of health pleads statutory sanction in justification of an act generally constituting a nuisance to private property, such as the erection of a pesthouse, it must show either that the act is

expressly authorized by the statute, or that it is plainly and necessarily implied from the powers expressly conferred. (Ind. App.) *Anable v. Board of Commrs., etc.*, 173.

HIGHWAYS.

See Animals; Municipal Corporations.

HOMESTEADS.

1. **HOMESTEADS—Conveyance—Nonjoinder of Wife.**—A conveyance of a homestead or of any part of it, by the owner, without his wife's joinder, is void, and ejectment lies by the vendor to recover it. (Miss.) *Bolen v. Lilly*, 291.

2. **HOMESTEADS—Conveyance—Nonjoinder of Wife—Estoppel.** A conveyance of a homestead without the joinder of the wife of the owner is void, and the warranty clause therein creates no estoppel against the vendor. (Miss.) *Bolen v. Lilly*, 291.

3. **A SHERIFF'S DEED of Property Which is Part of a Homestead** Need not State that the defendant was allowed to select the portion of the land which he would hold as his homestead, though such statement is required to appear in the return of the execution. (Mo.) *Kessner v. Phillips*, 368.

HOMICIDE.

CRIMINAL LAW—Instruction as to Excusable Homicide.—In Georgia, the distinction between excusable and justifiable homicide has been abolished. Hence, on the trial of an indictment for an assault with intent to murder, an instruction may be refused declaring that if the homicide would have been excusable if the shot had killed the man, the shooting at him without killing is also excusable. (Ga.) *Mixon v. State*, 149.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—Marriage Settlement—Consideration.** If a wife, by written contract expressed to be in consideration of a certain sum paid her by her husband, releases him from all claim which she, as his wife, may have against him, such release exhausts the consideration, and a subsequent provision in such contract that "for said consideration" she conveys to his children all interest which, as his widow, she may have in his estate, is without consideration. (Vt.) *Sawyer v. Churchill*, 762.

2. **HUSBAND AND WIFE—Separation Agreement.**—A written contract made by a wife to her husband shortly after their marriage, whereby, in consideration of a certain sum paid her by him, she releases him from all claims which, as his wife, she may have upon him, and reciting that such contract is made in pursuance of a contract made between them on their wedding day, is opposed to public policy and will not be enforced. (Vt.) *Sawyer v. Churchill*, 762.

3. **HUSBAND AND WIFE—Separation Agreements.**—Courts of equity will not specifically enforce the performance of contracts tainted with an understanding, contemporaneous with the marriage, looking to a possible or probable separation in the future, and, in the nature of things, tending to bring such a separation about. (Vt.) *Sawyer v. Churchill*, 762.

See Constitutional Law, 1; Homesteads.

INFANTS.*Arbitration.*

1. **AN INFANT'S SUBMISSION TO ARBITRATION is Voidable Merely** and not void. (N. C.) *Millsaps v. Estes*, 496.

2. **AN INFANT cannot Submit to an Award Which Will Give an Irrevocable Title.** (N. C.) *Millsaps v. Estes*, 496.

3. **INFANTS—Award.—A Guardian or Next Friend** has no power to submit to an award for an infant which would give an irrevocable title. (N. C.) *Millsaps v. Estes*, 496.

4. **A JUDGMENT by Consent Against Infants** based on submission to arbitration by their guardian ad litem or next friend is a subject of attack as to the submission itself and the award based thereon. (N. C.) *Millsaps v. Estes*, 496.

Judgments.

5. **INFANTS in Seeking to be Relieved from a Judgment Against Them Must do Equity** and restore whatever they have received under it. (N. C.) *Millsaps v. Estes*, 496.

6. **INFANTS, Judgment Against, When not Binding on.**—Where a suit purports to be commenced by infants to have a life estate forfeited for waste and for the cancellation of a certain conveyance, and the counsel of record submits to an arbitration only requiring the arbitrators to report the value of the land and the amount which had been paid their father therefor, and that judgment shall be rendered for the difference between the amount so paid and the value of the land, such judgment when entered is voidable at the instance of the infants. (N. C.) *Millsaps v. Estes*, 496.

See Parent and Child; Witnesses.

INJUNCTIONS.*In General.*

1. **INJUNCTION—Bailment—Removal of Fixtures.**—If boilers are delivered to the lessee of a building under a contract of bailment, and he, after attaching the boilers to the building and after making some payments on such contract, is declared a bankrupt, the vendor of the boilers may maintain a bill in equity to enjoin interference with the boilers against the owner of the building and parties in collusion with him to defraud the complainant, and also against the mortgagee of the building who objects to the removal of the boilers, and also against the bankrupt and his trustee. He is entitled to such remedy because there is no adequate remedy at law. (Pa. St.) *Wetherill v. Gallagher*, 575.

2. **AN INJUNCTION will not Issue to Stop a Criminal Prosecution** if the complainant can assert his rights by way of defense to such prosecution. (Ga.) *Sylvania v. Hilton*, 162.

Judgments.

3. **JUDGMENTS—Injunction.**—A judgment enjoining the use of water to irrigate undefined parts of a number of surveys is too indefinite to be enforced. (Tex.) *Watkins Land Co. v. Clements*, 653.

4. **JUDGMENTS—Injunction.**—A judgment enjoining persons, not parties to the suit, but interested in the subject matter thereof, is erroneous and cannot be enforced. (Tex.) *Watkins Land Co. v. Clements*, 653.

See Waste.

INNKEEPERS.

1. INNKEEPERS' LIENS—Salesmen's Samples—Estoppel.—The fact that hotel-keepers admit an extensive acquaintance with traveling salesmen for wholesale houses and their methods of doing business, and that they never knew of an instance in which such a salesman owned the samples that he carried, is evidence of knowledge of a custom so universal as to estop such hotel-keepers, in an attempt to assert an innkeeper's lien against such samples, from asserting their ignorance of the ownership of the samples, if they failed to make inquiry as to title before trusting the salesman on the strength of his interest therein. (Wash.) *Wertheimer-Swarts Shoe Co. v. Hotel Stevens Co.*, 864.

2. INNKEEPERS—Lien of.—An inn or hotel keeper, who knows that the property in possession of a guest does not belong to him, but is the property of a third person, can have no lien thereon. (Wash.) *Wertheimer-Swarts Shoe Co. v. Hotel Stevens Co.*, 864.

3. INNKEEPERS—Lien of.—A statute giving an innkeeper a lien on "the baggage, property, or other valuables" of his guest, does not confer a lien on the samples of a traveling salesman, known by the innkeeper to be the property of the employer of such salesman. (Wash.) *Wertheimer-Swarts Shoe Co. v. Hotel Stevens Co.*, 864.

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INSTRUCTIONS.

See Trial, 2-5.

INSURANCE.**Fire Insurance—Bailment.**

1. INSURANCE, FIRE—Property of Third Person Held on Bailment.—An insurance policy against loss and damage by fire of the stock and material of a specified person or company contained in a particular building, whether such stock and material are "either its own or held in trust, or on commission, or in storage for repairs, or sold and not delivered," covers the property of a third person re-

ceived by the insured to be repaired by him and thereafter held by him for the purpose of selling it for the owner, and in the building at the time it is destroyed by fire. (Wis.) Johnston v. Charles Abresch Co., 995.

2. **INSURANCE, FIRE—Bailment.**—A bailee or agent holding property for the purpose of repair, or of sale may insure it against loss or damage by fire for the protection of his special interest, and that of the owner, and such insurance may be taken in the name of the possessor, and, in case of loss, the avails of the policy may be applied in satisfaction of his claim against the property, and, if there is an amount above such claim, he holds it for the owner. (Wis.) Johnston v. Charles Abresch Co., 995.

3. **INSURANCE, FIRE—Bailment—Requisites of Contract.**—If a bailee or agent holding property of another insures it against loss or damage by fire for the protection of his special interest and that of the owner, it is one of the requisites to the validity of the contract that it appear therefrom that such owner was within the contemplation of the parties when it was made, but it is not essential that the insurance fasten upon specific property, nor need the owner be known at the inception of the contract, and if such owner, when informed of the contract of insurance, assents to and adopts it, he thereby becomes entitled to its advantages as fully as if originally made by his express authority. The right of such adoption and ratification continues while the contract is in force, and for a reasonable time after a loss thereunder. (Wis.) Johnston v. Charles Abresch Co., 995.

4. **INSURANCE, FIRE—Bailment—Evidence to Vary Contract of Insurance.**—If a bailee, holding the property of another, insures it against loss or damage by fire, for the protection of his special interest therein and that of the owner, the fact such owner was not a party to the contract of insurance at its inception, does not, after he has adopted, and ratified it, and after loss and notice, permit the parties and those claiming under them, to contradict, vary, or modify the contract by showing that it does not embody the agreement actually made. (Wis.) Johnston v. Charles Abresch Co., 995.

5. **INSURANCE, FIRE—Bailment—Apportionment of Loss.**—If a bailee holding the property of another insures it against loss or damage by fire, for the protection of his special interest and that of the owner, and the latter ratifies and adopts such contract of insurance, he is, in case of loss, entitled to recover from whatever amount of insurance is paid, to indemnify the loss, such proportion as the value of his property bears to the whole amount paid, except that the bailee has the right to indemnify himself in full to the extent of his interest or lien on the property, out of the amount due for the loss. (Wis.) Johnston v. Charles Abresch Co., 995.

Fire Insurance—Waiver of Conditions.

6. **INSURANCE—Conditions, When Restricted to Acts Occurring Before the Delivery of the Policy.**—Conditions which enter into the validity of a contract of insurance at its inception may be waived by the agent and are waived if so intended, though they remain in the policy when delivered, and limitations therein on the authority of the agent to waive such conditions otherwise than in writing attached to or indorsed upon the policy, refer to waivers made after its issuance. (Ga.) Johnson v. Aetna Ins. Co., 92.

7. **INSURANCE—Condition of Title not Mentioned in nor Indorsed on the Policy—Estoppel.**—Where an agent when taking an ap-

plication for insurance is informed that the building to be insured belongs to the assured but is situated on leased property, and subsequently issues and delivers the policy, the insurer is estopped from relying on a condition therein that it, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void, if the subject of insurance be a building on ground not owned by the insured in fee simple, although the policy further provides that no officer, agent, or other representative shall have power to waive any provision or condition therein except such as by the terms of the policy may be the subject of an agreement indorsed thereon or added thereto, and as to such provisions and conditions, no officer, agent or representative shall have power or be deemed to have waived such provision or condition, unless such waiver shall be in writing upon or attached thereto, nor shall any provision or permission affecting insurance under this policy exist or be claimed by the insured unless so written or attached. (Ga.) *Johnson v. Aetna Ins. Co.*, 92.

Mutual Benefit Insurance.

8. BENEFIT ASSOCIATIONS—Enlargement of Prohibited Risks. A fraternal benefit association may reserve the right to amend its list of prohibited occupations, and the enlargement of such list by including the occupation of a switchman as extrahazardous is reasonable and valid. (Conn.) *Gilmore v. Knights of Columbus*, 17.

9. BENEFIT ASSOCIATIONS—Extrahazardous Occupation—Forfeiture of Insurance.—One who becomes a member of a fraternal benefit organization under an express agreement that he is to forfeit his membership if he engages in any occupation which is then, or may thereafter be deemed, extrahazardous, is bound by a reasonable amendment subsequently made by the association to its list of extrahazardous occupations so as to include the occupation in which he is engaged, although such amendment contains no provision making it retroactive. (Conn.) *Gilmore v. Knights of Columbus*, 17.

Accident Insurance.

10. INSURANCE, ACCIDENT—Waiver of Conditions.—A provision in an accident insurance policy in relation to the payment of premium is waived by the delivery of the policy by an authorized agent with full knowledge of the fact that the insured had been injured subsequently to the date of the application for insurance, and the receipt and retention of the premium at the time of the delivery of the policy. (N. C.) *Rayburn v. Pennsylvania Casualty Co.*, 548.

11. INSURANCE, ACCIDENT—Time of Taking Effect.—An accident insurance policy takes effect from its date, unless it is otherwise stated that it shall take effect only upon certain stated conditions, and if such conditions are met, and the policy delivered, it takes effect as of the day of its date. (N. C.) *Rayburn v. Pennsylvania Casualty Co.*, 548.

12. INSURANCE, ACCIDENT—Effect of Delivery of Policy.—In the absence of fraud the delivery of an accident insurance policy is conclusive proof that the contract is completed, and an acknowledgment that the premium was properly paid during good health. (N. C.) *Rayburn v. Pennsylvania Casualty Co.*, 548.

13. INSURANCE, ACCIDENT—Effect of Issuance of Policy.—If accident insurance is applied for and a policy subsequently issues and is delivered, it is based on the status of the insured at the time of the application for insurance, and the insurer assumes the risk after the date of the policy. (N. C.) *Rayburn v. Pennsylvania Casualty Co.*, 548.

14. INSURANCE, ACCIDENT—Construction of Contract.—If a contract of accident insurance is reasonably susceptible of two constructions, that must be adopted which is most favorable to the insured. (N. C.) Rayburn v. Pennsylvania Casualty Co., 548.

See Exemptions, 4, 5.

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INTOXICATING LIQUORS.

See Nuisances.

INTOXICATION.

See Contracts, 12, 13.

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IRRIGATION.

See Eminent Domain; Waters and Watercourses.

JUDGMENTS.

Of Other States.

1. **JUDGMENTS of Courts of Other States—Conclusiveness.**—A decree of mortgage foreclosure, fair and regular on its face, rendered by a court of general jurisdiction in one state upon summons by publication, is conclusive in another state as to the fact of foreclosure, when the trial court decides that the record showing such foreclosure is properly authenticated to be received as evidence. (Wash.) *Clark v. Eltinge*, 858.

Res Judicata.

See Adoption; Corporations, 55.

2. **RES JUDICATA—Sufficiency of Complaint.**—If the supreme court has held on two former occasions that the facts alleged in a complaint constitute a good cause of action in favor of a corporation against the defendants, enforceable at the suit of plaintiffs as stockholders to recover of the defendants the profits obtained in buying land at one price and selling it to the corporation at another, the sufficiency of the complaint to support a judgment is *res judicata*. (Wis.) *Pietsch v. Milbrath*, 1017.

3. JUDGMENTS—Res Judicata—Equitable Relief.—A judgment for defendant in an action of trespass to try title to land sold under a judgment foreclosing a tax lien and to set aside the latter judgment is not a bar to a subsequent suit in equity to set aside the sheriff's deed for irregularities in the sale, and gross inadequacy of price. The two suits, together with the issues and the evidence to support them, as separate and distinct. (Tex.) *Moore v. Snowball*, 596.

4. JUDGMENTS—Collateral Attack—Res Judicata.—If a judgment is attacked in a collateral proceeding, and the adverse party waives the form of attack, and the issues are determined by a court of competent jurisdiction, such determination is binding and conclusive, unless set aside in some manner authorized by law. (Wash.) *In re Clifford*, 819.

See Infants, 5, 6; Injunctions, 3, 4.

JUDICIAL SALES.

1. JUDICIAL SALE—Innocent Purchasers, When not Protected by.—Where the irregularity and defects are apparent on the face of the record, persons purchasing the property subject thereto must be deemed to have had notice of such defects. (N. C.) *Millsaps v. Estes*, 496.

2. JUDICIAL SALE, Void, What Does not Amount to a Ratification of.—Where a trustee's sale under order of court is void as to certain infant remaindermen, they do not, by living with their father on lands procured with the proceeds of such sale and being supported therefrom during their minority and by briefly occupying such land after the termination of the life estate and the accrual of their cause of action, ratify such sale. (Ga.) *Smith v. McWhorter*, 85.

JURISDICTION.

See Process.

JURY TRIAL.

JURY TRIAL.—A Waiver of the Right to Trial by Jury must be by consent of the parties entered of record, which is the manner prescribed by the legislature. (W. Va.) *Lipscomb v. Condon*, 938.

LABOR UNIONS.

See Conspiracy.

LIBEL AND SLANDER.

1. LIBEL.—If There is No Suggestion in the Complaint in action for libel that the plaintiff was injured as an individual, but only in respect to his profession, the court may properly exclude from the jury all consideration of damage to him as an individual. (Mont.) *Paxton v. Woodward*, 416.

2. LIBEL—Presumption of Injury.—When a Publication is libelous per se, injury is presumed to result therefrom, affording ground for the allowance of at least nominal damages. (Mont.) *Paxton v. Woodward*, 416.

3. LIBEL—Jury as Judge of Law and Facts.—Although the constitution provides that the jury, under the direction of the court, shall determine the law and the facts in actions for libel, an erroneous in-

struction to the jury may warrant a reversal by the appellate court. (Mont.) Paxton v. Woodward, 416.

4. **LIBEL.**—To Publish of an Individual that He is a Common Liar, by a written charge which is untrue and unprivileged, is libelous per se. (Mont.) Paxton v. Woodward, 416.

5. **LIBEL.**—In Arriving at the Sense in Which Defamatory Language is employed, it is proper to consider the cause and circumstances of its publication and the entire language used. (Mont.) Paxton v. Woodward, 416.

6. **LIBEL.**—When an Imputation Complained of is a Conclusion from certain facts, a plea of justification which avers the existence of a state of facts warranting the inference of the charge is sufficient. (Mont.) Paxton v. Woodward, 416.

7. **LIBEL.**—Colloquium and Innuendo.—When words are unequivocal in their meaning and obviously defamatory, it is not necessary to employ colloquium or innuendo to explain their application and meaning; but if words are of a doubtful significance, or derive their libelous character, not from their own intrinsic force, but from extraneous facts, it is necessary to allege the meaning intended, or set forth such extraneous facts by proper averments. (Mont.) Paxton v. Woodward, 416.

8. **LIBEL.**—To Say of a School Teacher that he is "noted," though in an invidious sense, and, referring to a particular district, "has done more damage and less good than any other teacher," and, referring to his application for a position as teacher of its school, "this district knows when it has had enough, so it turned the gentleman down," does not impeach him in any of those qualities which are essentials of an accomplished teacher, and to falsely assail which is libelous per se. (Mont.) Paxton v. Woodward, 416.

9. **LIBEL.**—The Existence of Malice is not Necessary, under the Montana statutes, to entitle the plaintiff in a libel case to recover. (Mont.) Paxton v. Woodward, 416.

10. **LIBEL.**—The Presence or Absence of Malice becomes material, in an action for libel, only as a circumstance affording a basis for increasing or diminishing the amount of recovery, and in cases involving the defense of privileged communication. (Mont.) Paxton v. Woodward, 416.

11. **LIBEL.**—If Malice is Wanting, only compensatory damages can be recovered in an action for libel; but if malice is present, exemplary damages may be added to the actual or compensatory damages. (Mont.) Paxton v. Woodward, 416.

12. **LIBEL.**—Malice is an Inference of Fact which the jury may draw from a libelous publication alone. (Mont.) Paxton v. Woodward, 416.

13. **LIBEL.**—Other Statements and Defamatory Charges made by the defendant in a libel suit, even though after the commencement of the action, which tend to evince a wish to annoy or injure the plaintiff, are admissible to prove malice, but not to afford a basis for extra compensation. (Mont.) Paxton v. Woodward, 416.

14. **LIBEL.**—In an Action by a School Teacher for Libel, he may show, in order to prove malice, that after the publication of the defamatory language the defendants attempted to have his certificate to teach revoked, and that after the institution of the suit they threatened to secure the cancellation of his certificate. (Mont.) Paxton v. Woodward, 416.

15. LIBEL.—The Defendant in a Libel Suit may be Interrogated with respect to his motive in using the language alleged to be libelous, and be permitted to explain certain of his statements, whether they are true and the source of his information as to their truth, when these facts are involved in the issues presented by the pleadings. (Mont.) Paxton v. Woodward, 416.

See Breach of Promise to Marry.

LICENSE.

See Physicians and Surgeons.

Note.

Liens. See Innkeepers' Liens.

LIMITATION OF ACTIONS.

1. LIMITATION OF ACTIONS.—Ignorance of His Rights on the part of the person against whom the statute of limitations has commenced to run will not suspend its operation. (Wis.) Pietsch v. Milbrath, 1017.

2. LIMITATION OF ACTIONS.—Concealed fraud will not postpone the running of the statute of limitations respecting a cause of action at law. (Wis.) Pietsch v. Milbrath, 1017.

3. LIMITATION OF ACTIONS—Mortgages—Absence from State. The statute of limitations does not run against a mortgagor, holding the legal title, during his absence from the state, so as to enable a holder of unsecured notes against him older than the mortgage notes, to acquire, by attachment, a superior lien upon the mortgaged property, provided the mortgagee promptly intervenes in the attachment proceeding and proceeds to foreclose his mortgage. (Wash.) Perkins v. Bailey, 831.

See Adverse Possession.

LOST WILL.

See Wills, 13-17.

Note.

Mandamus in aid of right to inspect books and papers of corporations, 679, 687.

MARRIAGE.

See Breach of Promise to Marry; Divorce; Husband and Wife.

MASTER AND SERVANT.

Safe Place and Appliances—Vice-Principal.

1. MASTER AND SERVANT—Defective Appliances—Negligence.—If a master keeps in his factory timbers for the construction of staging used in installing elevators, and his servant in charge of such installation selects from such timber supply a palpably defective plank, which causes the death of an unskilled workman, the master is liable for negligence in failing to provide proper materials for such staging, and the fact that the servant in charge of the installation had obtained from the owner of the building where the work was being done permission to use planks then therein, does

not relieve the master from liability. (Conn.) *Farrell v. Eastern Machinery Co.*, 45.

2. MASTER AND SERVANT—Safe Place—Negligence—Vice-Principal.—The duty to provide a safe place to work and to maintain it in a reasonably safe condition by inspection and repair is a direct, personal and absolute obligation from which nothing but performance can relieve an employer. The person to whom it is delegated becomes a vice-principal whose neglect is the neglect of the employer. (Pa. St.) *Schiglizzo v. Dunn*, 567.

3. MASTER AND SERVANT—Safe Place—Contributory Negligence.—If the evidence shows that a servant was injured while at work on a dangerous pile of stones, but had protested before that time to the master's superintendent against the dangerous condition of such place and refused to work there, and had been reprimanded by such superintendent, and ordered to go on with the work under a promise that the danger should be removed, it cannot be said as matter of law that the danger was so obviously imminent that the servant was guilty of contributory negligence in not absolutely refusing to go on with the work, and whether he was thus guilty under the circumstances is a question of fact for the jury. (Pa. St.) *Schiglizzo v. Dunn*, 567.

Fellow-Servants.

4. MASTER AND SERVANT—Incompetency of Coservant—Sufficiency of Complaint.—A complaint in an action to recover for personal injury sustained through the employment of an incompetent fellow-servant, sufficiently alleges his general incompetency when it alleges that he was negligent and incompetent in the discharge of his duties, that this fact was known to the master and unknown to the injured servant, setting out the facts constituting his incompetency and negligence, and also setting out two specific instances and occasions when he had been thus negligent. (Wash.) *Conover v. Neher-Ross Co.*, 841.

5. MASTER AND SERVANT—Incompetency of Coservant—Evidence of Specific Acts.—In an action to recover for personal injury to a servant caused by the act of his master in retaining an incompetent fellow-servant in his employ, evidence of two prior specific acts of negligence on the part of such fellow-servant is admissible, in connection with further testimony that the master was informed of such specific acts. Such prior acts constitute a series of acts showing general incompetency. (Wash.) *Conover v. Neher-Ross Co.*, 841.

6. MASTER AND SERVANT—Fellow-servants.—A foreman of a railroad section gang and one of his men are fellow-servants. (Conn.) *Whittlesey v. New York etc. R. R. Co.*, 21.

7. MASTER AND SERVANT—Section Gang—Fellow-servants.—If a railroad company provides a suitable handcar for its section gang of men, properly equips them with signal flags, and supplies a sufficient number of competent men to properly perform the work, it is not required to see that such flags are used when necessary. That is the duty of the men, all of whom, including their foreman, are fellow-servants. (Conn.) *Whittlesey v. New York etc. R. R. Co.*, 21.

8. MASTER AND SERVANT—Section Gang—Fellow-servants.—A foreman of a railroad section gang and one of his men are fellow-servants, and the negligent failure of such foreman to use a signal flag when necessary, resulting in injury to one of such men, does not render the railroad company liable therefor. (Conn.) *Whittlesey v. New York etc. R. R. Co.*, 21.

9. MASTER AND SERVANT—Intervening Negligence of Employé.—The intervention of negligence on the part of an employé does not absolve the master from liability for the consequences of which the failure of the latter to exercise reasonable care was the efficient cause. (Conn.) *Farrell v. Eastern Machinery Co.*, 45.

See Release.

Note.

Master and Servant, release given by the latter to the former for claims for damages resulting from negligence, 615-620.

MAXIMS.

See Criminal Law, 5, 6.

MAY.

See Words and Phrases.

MECHANIC'S LIEN.

1. MECHANICS' LIENS—Definiteness of Contract.—It is not essential to a mechanic's lien that the contract for furnishing the labor or material should be so definite as to enable the one personally liable to the lien claimant, or the owner or person interested in the building to determine precisely the contract price for such labor or material or the details of the work. It is sufficient as to any work or material furnished that it is in fact included in the contract. (Wis.) *Hutchins v. Bautch*, 1014.

2. MECHANICS' LIENS—Time for Filing.—If the time for filing a mechanic's lien claim is limited to six months subsequent to the last charge for furnishing material or work, such time as to all work or material furnished under one contract, regardless of the time occupied in the execution thereof, commences at the date when the last labor or material is furnished. (Wis.) *Hutchins v. Bautch*, 1014.

3. MECHANICS' LIENS—Continuity of Work.—There must be some visible commencement of work to fix the time of the commencement of a mechanic's lien claim, but there need not be a visible continuity of work, in order that the last labor or material furnished may relate back to the beginning of the work, and all be regarded as furnished under one contract. (Wis.) *Hutchins v. Bautch*, 1014.

4. MECHANICS' LIENS—Unreasonable Delay—Estoppel.—Such delay in completing lienable contract work as to indicate full performance, or abandonment of the work, so clearly as to render failure to make inquiry in respect to the matter excusable, is binding upon the mechanic's lien claimant upon principles of estoppel in pais. (Wis.) *Hutchins v. Bautch*, 1014.

5. MECHANICS' LIEN—Sale of Land Pending Work under Contract—Offer to Perform.—If one sells his land while mechanic's lienable work is in progress thereon under a contract, the license incident to the contract to enter upon the premises may be terminated by the new owner, but he cannot by any mere act of his defeat the lien remedy of the contractor for work already done, and if he refuses to allow completion of the contract, an offer to do so on the part of the contractor is equivalent to performance as regards the commencement of the time limited for filing the lien petition for work and material already furnished. (Wis.) *Hutchins v. Bautch*, 1014.

MINORS.

See Infants.

MORTGAGES.

1. **MORTGAGES—Attachment—Intervention Notice.**—A mortgagee who intervenes in an action of attachment against the mortgaged property is entitled to notice of all subsequent proceedings in the action. (Wash.) *Perkins v. Bailey*, 831.

2. **MORTGAGES—Foreclosure—Redemption—Possession—Conflict of Statutes.**—If, at the time of the execution of a mortgage and at the time of its foreclosure, the statute permits the purchaser to take possession immediately upon confirmation of the sale, and retain it during the period of redemption, an intermediate statute in force during the existence of the mortgage permitting the mortgage debtor to have possession during such period of redemption has no application, so as to entitle such debtor to a credit for rental value of the premises during the period of redemption. (Wash.) *Clark v. Eltinge*, 858.

3. **MORTGAGES—Foreclosure—Receivership.**—If, on a mortgage foreclosure, there is ample showing justifying the appointment of a receiver with power to collect rents, the mortgagor cannot complain of the inclusion in the receivership of a part of the premises on which rent has been paid in advance for more than the period of redemption. (Wis.) *Thorp v. Mindeman*, 1003.

See Bills and Notes; Limitation of Actions, 3.

MUNICIPAL CORPORATIONS.

Limit of Indebtedness.

1. **MUNICIPAL CORPORATIONS.—Constitutional Limitations of Amount of Indebtedness Apply Only to Liabilities Ex Contractu.**—Hence, one injured in the public streets of a city through its negligence may recover damages therefor, notwithstanding the provisions of the constitution of the state limiting the rate of taxes that may be levied, providing the amount of indebtedness which the city may incur, and forbidding the incurring in one year of indebtedness to an extent in the aggregate beyond the revenue to be derived from the taxes of that year. (Mo.) *Connor v. City of Nevada*, 314.

Ordinance Fixing Fire Limits.

2. **MUNICIPAL ORDINANCES—Evidence as to Construction of.** If a building ordinance, or an ordinance prescribing fire limits, is not clear, but is of ambiguous or doubtful meaning, it is competent to show what has been the ordinary construction placed on it by the municipal authorities. (Ga.) *Sylvania v. Hilton*, 162.

3. **MUNICIPAL ORDINANCES—Construction of.**—An ordinance declaring that all buildings within the fire limits shall be constructed of brick, stone, or other incombustible substance or material, and covered with tin or metallic or fire-proof roofing, is not susceptible of the construction that a building may be constructed of combustible material if covered with corrugated iron. (Ga.) *Sylvania v. Hilton*, 162.

4. **MUNICIPAL ORDINANCES, Evidence to Aid Construction of, When Inadmissible.**—If an ordinance requires buildings within the fire limits to be of "incombustible" material, this word is not so ambiguous in meaning as to justify the admission of evidence to the effect that the ordinance has been by the municipal authori-

ties construed as permitting the erection of buildings of combustible material, provided they were covered with corrugated iron. (Ga.) *Sylvania v. Hilton*, 162.

5. MUNICIPAL ORDINANCES, Strict Construction of Penal Provisions.—Where an ordinance provides for the punishment of any person who erects, or attempts to erect, any wooden building in violation of its provisions, the ordinance must be strictly construed, and does not warrant the punishment of one who erects a building, otherwise wooden, but covered at the sides with corrugated iron. (Ga.) *Sylvania v. Hilton*, 162.

Public Streets—Unsafe Condition.

6. MUNICIPAL CORPORATIONS—Public Street, What Deemed to be.—If it appears that a street has for years been used by the public as such, and graded, ditched, and sidewalked under the immediate supervision of the city street commissioner, and that the city has by ordinance granted a railway company authority to lay switch tracks and to construct a culvert therein, it will be deemed a public street of such city, though no ordinance can be shown directing the commissioner to do the work. (Mo.) *Connor v. City of Nevada*, 314.

7. MUNICIPAL CORPORATIONS—Streets—Negligence—Question for the Jury.—If a large millstone is on a level with the sidewalk on its inner side, but extends more than two feet into the sidewalk toward the street and is there five inches above the plane of the sidewalk, and between it and the curb is a wide extent of sidewalk over which one must pass, it is for the jury to say whether or not the municipality was negligent in permitting the stone to remain. (Mo.) *Fischer v. St. Louis*, 380.

8. MUNICIPAL CORPORATIONS.—The Fact that a Millstone in a Public Street had Been There for Twenty-seven Years before it caused any injury does not exempt the municipality from liability to a person injured thereby, if the city was originally negligent in permitting the stone to be there. (Mo.) *Fischer v. St. Louis*, 380.

9. MUNICIPAL CORPORATIONS—Streets—Contributory Negligence.—Where a street is dark and the person using it knows of, and does not forget, an obstruction, but makes a conscious effort to avoid it, and is injured, it is for the jury to say, from all the surrounding circumstances, whether the person injured acted with the prudence of a reasonable person. He cannot be judged guilty of contributory negligence as a matter of law. (Mo.) *Fischer v. St. Louis*, 380.

10. NEGLIGENCE, Contributory, in Walking in the Dark in a Public Street.—A woman cannot be judged guilty of contributory negligence as a matter of law because, being unable to find any vehicle in which to ride from a railway depot, she walked in the dark along a public street carrying an infant in her arms and holding another by the hand, trusting that the city had done its duty by keeping the streets in a reasonably safe condition. (Mo.) *Connor v. City of Nevada*, 314.

Additional Servitudes in Streets.

11. MUNICIPAL CORPORATIONS—Streets and Sidewalks—Abutting Owners—Additional Servitude.—The right acquired by a city by condemnation of a street and sidewalk is confined to the public necessity and to uses for which property is taken or burdened with the easement, and for any additional burden placed upon the servient tenement, compensation must be made. (N. C.) *Brown v. Asheville Electric Co.*, 554.

12. MUNICIPAL CORPORATIONS—Streets—Rights of Abutting Owners—Additional Servitude.—The power of a city to confer a franchise to lay tracks, erect poles, and string wires along the streets or sidewalks of the city cannot affect the right of abutting owners to demand compensation for any additional burden thereby imposed upon their property. (N. C.) *Brown v. Asheville Electric Co.*, 554.

13. MUNICIPAL CORPORATIONS—Streets—Poles and Wires—Additional Servitude.—Planting telephone or telegraph poles and stringing wires upon a public street, the fee of which is in the abutting owner, is an appropriation of private property, and an imposition of an additional servitude for which such owner may claim and recover compensation. (N. C.) *Brown v. Asheville Electric Co.*, 554.
Shade Trees in Streets.

14. MUNICIPAL CORPORATIONS—Streets—Shade Trees growing and standing upon the sidewalk of a public street are the property of abutting owners, and cannot be removed without their consent, except when their removal is necessary for the use of the street as a public highway. (N. C.) *Brown v. Asheville Electric Co.*, 554.

15. MUNICIPAL CORPORATIONS—Streets—Removal of Shade Trees—Damages.—If an electric company, in order to more conveniently place its poles and string its wires, removes a shade tree standing on the sidewalk of premises abutting on the street without the consent and against the protest of the abutting owner, its act is willfully wrong and wanton, and such owner is entitled to recover exemplary and punitive damages. (N. C.) *Brown v. Asheville Electric Co.*, 554.

See Garnishment, 4.

Note.

National Banks, inspection of books and papers, stockholder's right to, 674.

NE EXEAT.

See Divorce.

NEGLIGENCE.

1. NEGLIGENCE—Injury to Child by Revolving Door to Building.—The owner of a building containing an unguarded "circular entrance," consisting of a revolving door, is not liable for an injury to a trespassing child of tender years by such door while at play. Liability cannot be based on the ground that such device is particularly attractive to children and that it is negligence to leave it unguarded. The doctrine of the "turntable cases" does not apply. (Wash.) *Harris v. Cowles*, 847.

2. NEGLIGENCE.—Doctrine of Turntable Cases will not be Extended to cases not involving turntables themselves. (Wash.) *Harris v. Cowles*, 847.

3. NEGLIGENCE—Contributory—Violation of Ordinance.—A person complaining of an injury caused or contributed to proximately by his own violation of a valid city ordinance cannot recover. (Tex.) *Denison etc. Ry. Co. v. Carter*, 626.

4. NEGLIGENCE—Subsequent and Additional Injury Due to.—If a person is injured through a defect in a public street and is entitled to recover from the city therefor, he must use reasonable care to promote his recovery; but if a subsequent accident occurs in

which he is guilty of no negligence, whereby the result of the injury is made more severe, this result becomes a result of the first accident and does not diminish the right to recover therefor. (Mo.) *Connor v. City of Nevada*, 314.

See Damages.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

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Negotiable Instruments, intoxication of the maker as a defense to, 545.

NEW TRIAL.

1. **NEW TRIAL—Misconduct of Jury.**—The fact that the jury took a ballot on a quotient verdict is not ground for a new trial, when there is no agreement to be bound by the result of such ballot, and other ballots were subsequently taken, and the result of such ballot was not in fact adopted. (Wash.) *Conover v. Neher-Ross Co.*, 841.

2. **NEW TRIAL—Newly Discovered Evidence—Proof of Diligence.** An applicant for a new trial on the ground of newly discovered evidence must make strict proof of diligence. A general averment of its existence is insufficient; but he must set forth in his affidavits in detail and with particularity what acts were performed. The affidavits should show what diligence was used, how the new evidence was discovered, why it was not discovered before the trial, and such other facts as make it clear that the failure to produce the evidence was not because of the fault or want of diligence of the movant. (Mont.) In *re Colbert's Estate*, 439.

3. **NEW TRIAL—Newly Discovered Evidence—Proof of Diligence.** A statement in affidavit for a new trial on the ground of newly discovered evidence that the movant made inquiry of every person he thought might know anything about the case, is an insufficient showing of reasonable diligence. (Mont.) In *re Colbert's Estate*, 439.

4. **NEW TRIAL—Newly Discovered Evidence.**—It is the Duty of the Court, on hearing a motion for a new trial on the ground of newly discovered evidence, to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility of the witnesses. (Mont.) In *re Colbert's Estate*, 439.

5. **NEW TRIAL—Newly Discovered Evidence.**—A new trial should not be granted on the ground of newly discovered evidence, unless such evidence makes it clearly probable that it will produce a different result on the retrial. (Mont.) In *re Colbert's Estate*, 439.

6. **NEW TRIAL—Newly Discovered Evidence—Discretion of Court.**—Applications for new trials on the ground of newly discovered evidence are addressed to the sound legal discretion of the trial judge, and his action thereon will not be disturbed on appeal, except for a clear and unmistakable abuse of such discretion. (Mont.) In *re Colbert's Estate*, 439.

NONSUIT.

See Dismissal and Nonsuit.

NOTICE.

1. **NOTICE—Unrecorded Deed.**—The Payment of Taxes by the grantee in an unrecorded deed is not notice of his claim of title to a subsequent purchaser. (Mont.) *Sheldon v. Powell*, 429.

2. **NOTICE—Unrecorded Deed.**—The Burden of Proof is on the grantee in an unrecorded deed to show that a subsequent purchaser had notice. (Mont.) *Sheldon v. Powell*, 429.

3. **NOTICE—Possession—Unrecorded Deed.**—If the grantee in an unrecorded deed takes possession of the land, makes improvements thereon by plowing, seeding, and fencing, but does not reside on the premises, and subsequently the grantor takes another person to the property of whom he is attempting to obtain a loan, and no one is found on the premises, and no house save an uninhabitable shack, a bargain and sale deed executed by the grantor to such person as security for a loan, and recorded prior to the deed to the first grantee, has the preference. (Mont.) *Sheldon v. Powell*, 429.

NUISANCE.*Public, Private, and Mixed Nuisances.*

1. **NUISANCE—Public.**—A nuisance is a public nuisance if it annoys such part of the public as necessarily comes in contact with it. (Ind. App.) *State v. Tabler*, 256.

2. **NUISANCE—Public.**—Anything which is an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life and property by an entire community or neighborhood, or any considerable number of persons is a public nuisance. (Ind. App.) *Acme Fertilizer Co. v. State*, 190.

3. **NUISANCE—Private and Public.**—Whatever is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life or property is a nuisance. If the injury is limited to an individual, it is private; if it affects the public it is public and the subject of a public prosecution. (Ind. App.) *Acme Fertilizer Co. v. State*, 190.

4. **NUISANCE—Mixed.**—There is a class of acts properly denominated mixed nuisances, being both private and public in their effects. They are public in that they produce injury to many persons or all the public, and private because at the same time they produce a particular injury to private rights, which subjects the wrongdoer to indictment by the public and to damages at the suit of the person or persons injured. (Ind. App.) *Acme Fertilizer Co. v. State*, 190.

5. **NUISANCE—Mixed—Private Right of Action.**—If the nuisance charged is a mixed one, the right to maintain a private action depends upon proof of a special injury different in kind from, and additional to, that suffered by the general public. (Ind. App.) *Acme Fertilizer Co. v. State*, 190.

What Amounts to Nuisance—Sale of Liquor.

6. **NUISANCE, PUBLIC.**—The maintenance of a public place equipped with devices intended to make the violation of the law comparatively safe from criminal prosecution and in which it is well known that the law is systematically violated is not only offensive to the senses and a nuisance, but also a menace to the peace of the community. (Ind. App.) *State v. Tabler*, 256.

7. **NUISANCE—Sale of Intoxicating Liquor.**—A license to sell intoxicating liquors does not protect the holder from the consequences of unlawful practices on the premises, and persons so offending may be liable, as for a nuisance, to a property owner individually damaged thereby. (Ind. App.) State v. Tabler, 256.

8. **NUISANCE—Public—Blind Tiger.**—A keeper of a "blind tiger" means a person engaged in the unlawful sale of intoxicating liquors, and whose place of business is a common nuisance. (Ind. App.) State v. Tabler, 256.

9. **NUISANCE, PUBLIC—Blind Tiger.**—A "blind tiger" is a public nuisance. (Ind. App.) State v. Tabler, 256.

Flooding of Land—Permanent Injury.

10. **NUISANCE—Permanent—Burden of Proof.**—If the only damage done to a complainant's land from a discharge of surface water is upon the occasion of a heavy fall of rain, and he sues for damages for permanent injury, the burden is upon him to prove that such rainfall caused him injury of a permanent character. (Ind. App.) Baltimore etc. R. R. Co. v. Quillen, 183.

11. **NUISANCE—Continuance of Wrong—Presumption.**—If the cause of injury is of such nature as to be abatable by the expenditure of labor or money, the law will not presume a continuance of the wrong. (Ind. App.) Baltimore etc. R. R. Co. v. Quillen, 183.

12. **NUISANCE—Permanent—Measure of Damages.**—If a railroad company in cutting ditches on its right of way throws barren earth on the lands of an adjoining owner, such injury is of a permanent character, and the measure of damages is the difference in the value of the land before and after such injury. (Ind. App.) Baltimore etc. R. R. Co. v. Quillen, 183.

13. **NUISANCE—Flooding Lands—Measure of Damages.**—The collection of surface water and its discharge upon the land of another is a temporary nuisance and abatable, and its continuance will not be presumed. The measure of damages for such act is the difference in the rental value of the land before and after the injury. (Ind. App.) Baltimore etc. R. R. Co. v. Quillen, 183.

Criminal Prosecution.

14. **NUISANCE—Public.**—Corporations may be prosecuted by indictment or information for erecting, continuing or maintaining a public nuisance. (Ind. App.) Acme Fertilizer Co. v. State, 190.

15. **NUISANCE—Public.**—An information charging the erection and maintenance of a building for the manufacture of products from the bodies of dead animals and the carrying on of the business of manufacturing products from the bodies of dead animals, is sufficient to show that such building was used or maintained for the exercise of a trade employment or business which might constitute a public nuisance. (Ind. App.) Acme Fertilizer Co. v. State, 190.

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OFFICERS.

PUBLIC OFFICERS—Proof of Who are and of Official Acts of.—Evidence of witnesses that they at the several dates named by them were street commissioners, and did work on a street in that capacity, is sufficient to show that they were such officers, and that such acts were official. (Mo.) *Connot v. City of Nevada*, 314.

OPINION EVIDENCE.

See Evidence, 18-20.

OPTIONS.

See Vendor and Vendee, 1-4.

PARENT AND CHILD.

1. PARENT AND CHILD—Tort by Parent—Action by Child.—A minor child cannot sue his parent for damages arising upon a tort committed by the parent against such child while the relation of parent and child exists. (Wash.) *Roller v. Roller*, 805.

2. PARENT AND CHILD—Rape by Parent—Action by Child.—A parent is not civilly liable to his child for a rape committed upon her by him during her minority, and while the relation of parent and child, with its mutual obligations, existed. (Wash.) *Roller v. Roller*, 805.

See Breach of Promise to Marry.

PARTITION.

In General.

1. PARTITION.—The Court may Decree a Division in Kind in a partition suit, although the bill does not specifically pray for it, if the allegations are sufficient and there is a prayer for general relief. (W. Va.) *Croston v. Male*, 918.

2. PARTITION—Appointment of Commissioners.—In partition proceedings the rights and interests of the parties should be judicially determined in advance of the appointment of commissioners and the ordering of a sale. (W. Va.) *Croston v. Male*, 918.

3. PARTITION—Allotment of Shares.—Formerly, the method of partition seems to have been to divide the land into equal parts, when the shares were equal, and then determine by lot the distribution of them. But now they may be assigned by the commissioners to avoid the risk of an unfortunate allotment; they may make a distribution upon principles of equity and justice, and in this their action is under the control of the court. (W. Va.) *Croston v. Male*, 918.

4. PARTITION—Estate by Curtesy.—Where one share of an estate goes to certain heirs subject to their father's estate by the curtesy, there can be no compulsory partition among them until the expiration of the life estate. (W. Va.) *Croston v. Male*, 918.

Sale.

5. **PARTITION—Sale.**—A Court has No Right to Decree a sale in partition proceedings, without the consent of the parties, unless it finds that a division in kind cannot conveniently be made, and that the interests of the owners will be promoted by a sale. (W. Va.) *Croston v. Male*, 918.

6. **PARTITION—Sale.**—A Statute Authorizing a Court to decree a sale in partition proceedings is an innovation upon the common law, and the conditions imposed by it must be present to authorize a conversion of the property into money. (W. Va.) *Croston v. Male*, 918.

7. **PARTITION—Sale—Appeal.**—An Adjudication by the trial court that the conditions are such as to call for a sale on a bill for partition, is entitled to great weight on appeal; yet if it appears that land has been decreed to be sold without sufficient cause, it is the duty of the appellate court to reverse the decree. (W. Va.) *Croston v. Male*, 918.

8. **PARTITION—Sale—Interests of Owners.**—A sale cannot be decreed in partition merely to advance the interests of one of the owners; before ordering a sale, the court must ascertain that the interests of all will thereby be promoted. (W. Va.) *Croston v. Male*, 918.

9. **PARTITION—Sale.**—One Test by Which to Determine whether the interests of all the parties in partition will be promoted by a sale is, whether the aggregate value of the several parcels into which the property must be divided will, when distributed among the different owners and held in severalty, be materially less than the value of the same property when owned by one person. (W. Va.) *Croston v. Male*, 918.

10. **PARTITION—Sale, When not Warranted.**—A sale in partition proceedings may be unwarranted, notwithstanding there are dower and curtesy estates in the property; and the land, because varying in quality, locality, and improvements, is not of uniform value; and, if a division in kind is made, some of the shares will be of small area. (W. Va.) *Croston v. Male*, 918.

PARTNERSHIP.

1. **PARTNERSHIP—Presumption as to Pledge of Credit.**—The power of one partner to pledge the credit of the partnership in the emission of commercial paper is presumed, with respect to trading or commercial partnerships, and not presumed under ordinary conditions with respect to nontrading partnerships. (Conn.) *Marsh v. Wheeler*, 40.

2. **PARTNERSHIP.**—Trading or Commercial partnerships are those which buy or sell, but buying and selling need not be their sole purpose, nor even their most characteristic feature. A partnership, for a manufacturing or mechanical business is commercial or trading, although buying and selling in the market is only one of its incidents. (Conn.) *Marsh v. Wheeler*, 40.

3. **PARTNERSHIP—Commercial.**—Whenever the business of a partnership, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading or commercial partnership. (Conn.) *Marsh v. Wheeler*, 40.

4. **PARTNERSHIP—Commercial.**—If a partnership contemplates the periodical, continuous, or frequent purchasing, not as incidental

to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured shape, it is a trading or commercial partnership. (Conn.) *Marsh v. Wheeler*, 40.

5. PARTNERSHIP—Commercial.—A partnership, whose conduct so involves buying and selling, whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit, and the usual instrumentalities of trade, and frequent contact with the commercial world in dealings which in their character and incidents are like those of traders generally, is a commercial or trading partnership. (Conn.) *Marsh v. Wheeler*, 40.

6. PARTNERSHIP—Commercial.—A partnership whose business is the taking and execution of plumbing contracts, and which makes frequent and extensive purchases and sales of fixtures and fittings in the fulfillment of its undertakings, is a commercial or trading partnership, although it conducts no store where articles bought are afterward sold. (Conn.) *Marsh v. Wheeler*, 40.

PERPETUITIES.

See Deeds, 3-5.

PESTHOUSE.

See Health, 7-10.

PHYSICIANS AND SURGEONS.

1. CONSTITUTIONAL LAW—Dentist's License.—A statute requiring an examination by, and license from, a state dental board, as a prerequisite to "owning, running, or managing a dental office, or department," is unconstitutional and void as an unwarrantable infringement of a natural property right, and as not being a legitimate exercise of the police power of the state. (Wash.) *State v. Brown*, 798.

2. POLICE POWER—Dentistry.—The health, moral or physical welfare of the public, or any of the personal or property rights of its individuals, are not endangered by the ownership and management of a dental office, so long as those employed therein to do the actual dentistry are qualified and licensed as by law required. Hence, an owner or manager of a dental office cannot be required to take out a license as a prerequisite to carrying on the business of dentistry, as such manager. (Wash.) *State v. Brown*, 798.

PLEADING AND PRACTICE.

1. PLEADING—Nuisance—Damages.—If a complaint shows that an alleged nuisance might be abated, and that there was no threat nor purpose to continue it, such facts do not render the complaint bad, but go to the question of damages. (Ind. App.) *Baltimore etc. R. R. Co. v. Quillen*, 183.

2. PRACTICE—Law or Equity.—Where an answer sets up an equitable defense, but asks no affirmative equitable relief, the cause is one at law and not in equity. (Mo.) *Kessner v. Phillips*, 368.

3. PLEADING—Complaint Sounding in Contract, not Tort.—If the allegations of a complaint contain all the facts setting forth the contractual relationship of the parties, the defendant's fault in omitting to perform the obligation imposed thereby, and a consequent pecuniary injury to plaintiff, the complaint sounds in contract and not in tort. (Wis.) *Johnston v. Charles Abresch Co.*, 995.

4. **PLEADING—Waiver of Reply to Counterclaim.**—If a reply is necessary in order to put the allegations constituting a counterclaim in issue, it is waived by treating the counterclaim as at issue by going to trial upon the merits, and proceeding thereon till near the close thereof before requiring such reply. (Wis.) Northern Supply Co. v. Wangard, 984.

5. **PLEADINGS—Amended Complaints.**—The trial court may properly refuse to allow a third amended complaint to be filed, after having considered an original and two amended complaints in the same action and involving the same matter. (Wash.) Harris v. Cowles, 847.

PLEDGES.

1. **PLEDGES—Remedies of Pledgee.**—In addition to proceeding personally against the pledgor for his debt without selling his pledge, the pledgee has his election of two remedies upon the pledge itself. He may file a bill in the nature of a foreclosure suit and proceed to a judicial sale, or he may sell without judicial process upon giving reasonable notice to the pledgor to redeem and of the intended sale. (Vt.) White River Savings Bank v. Capital Savings Bank etc. Co., 754.

2. **PLEDGES—Failure of Pledgor to Redeem.**—The pledgee of goods does not acquire an absolute title thereto by the failure of the pledgor to pay the debt or redeem the property at the time limited. His only interest is a special property to retain the goods for his security. (Vt.) White River Savings Bank v. Capital Savings Bank etc. Co., 754.

3. **PLEDGES—Enforcement of Security.**—The pledgee may enforce his security and cut off the pledgor's right to redeem by a lawful sale of the pledge, and whenever the purpose of the pledge is satisfied, the right to the surplus, if any, is in the pledgor or some one having an interest in the general property under him. (Vt.) White River Savings Bank v. Capital Savings Bank, etc. Co. 754.

4. **PLEDGES—Length of Time for Redemption.**—If no time of redemption is limited by the contract of pledge, the legal right to redeem is in the pledgor during his life, unless the pledgee, in the meantime, calls upon him to redeem, and if the pledgor die without such call, the right to redeem descends to his personal representatives. (Vt.) White River Savings Bank v. Capital Savings Bank etc. Co., 754.

5. **PLEDGES—Foreclosure—Parties.**—Although the pledgor is generally a necessary party to a suit in equity to enforce the pledge, yet when the pledgee files the written consent of the pledgor that the stock may be sold under judicial decree, and the proceeds applied first to the payment of the pledgee, and the remainder to the payment of a subsequently acquired lien of a third party, the necessity of making the pledgor a party is dispensed with. (Vt.) White River Savings Bank v. Capital Savings Bank etc. Co., 754.

See Corporations, 41-50.

POWER OF ATTORNEY.

See Principal and Agent, 2.

Note.

Prescription, public nuisance, right to maintain cannot be created by,
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PRINCIPAL AND AGENT.

1. **EVIDENCE—Proof of Agency.**—An allegation of agency may be proved by showing any state of facts which the law recognizes as establishing an agency. (Ga.) *Turner v. Turner*, 76.

2. **PRINCIPAL AND AGENT.**—Death Revokes All Powers of Attorney granted by the decedent, and an attorney cannot, after the death of his client or principal, complete for her an act for her benefit and which she undertook and intended to do in her lifetime. (Mo.) *Wash v. Wash*, 353.

3. **PRINCIPAL AND AGENT.**—The knowledge of an agent as to a material fact bearing upon the validity of a contract made on behalf of his principal is imputed to the latter, and this rule applies to contracts of insurance. (Ga.) *Johnson v. Aetna Ins. Co.*, 92.

4. **PRINCIPAL AND AGENT.**—Notice to an agent to bind his principal, must be within the scope of the agent's employment, and notice to him of any fact outside the scope of his agency will not affect his principal. (Conn.) *Marsh v. Wheeler*, 40.

5. **PRINCIPAL AND AGENT.**—Notice to the employé of a bank of a fact not within the scope of his employment, and which he is under no duty to communicate to the bank, is not notice to the bank. (Conn.) *Marsh v. Wheeler*, 40.

See Evidence, 10-15.

PRIVIES.

See Words and Phrases.

PRIVILEGED COMMUNICATIONS.

See Infants; Libel and Slander.

PROBATE MATTERS.

See Wills.

PROCESS.

LEGAL PROCESS—Attack on Validity—Estoppel.—The defense that legal process is void, when set up by the person procuring or using it, after it has affected another injuriously who makes demand for reparation, can be supported only when the defect relied on is of the most glaring character, such as lack of jurisdiction or the like. (Conn.) *Douglass v. Unmack*, 25.

PROMOTERS.

See Corporations, 4-10.

QUOTIENT VERDIOT.

See New Trial, 1.

RAILROADS.*In General.*

1. **RAILROADS—Rights Over Right of Way.**—The grant of a right of way to a railroad does not carry the right to go beyond its limits. The owner is not compensated by an assessment of damages

for the right of way for wrongful acts after the acceptance of a deed or the making of an appropriation. (Ind. App.) Baltimore etc. R. R. Co. v. Quillen, 183.

2. **RAILROADS—Fires—Presumption.**—If a fire originates from sparks from a railroad engine, it is presumed that such sparks were negligently emitted and if such presumption is not rebutted, a person suffering loss from such fire is entitled to recover from the railroad company. (N. C.) Fireman's Ins. Co. v. Seaboard Air Line Ry., 517.

Ejection of Trespasser.

3. **RAILROADS—Freight Brakemen—Ejection of Trespassers—Presumption.**—A freight brakeman on a railroad train is presumed to have authority to eject trespassers therefrom, and the burden of proof is upon the railroad company to show lack of actual or implied authority. (Wash.) Dixon v. Northern Pac. Ry. Co., 810.

4. **RAILROADS—Authority of Freight Brakemen to Eject Trespassers—Evidence.**—It is within the general authority of a brakeman on a freight train to remove trespassers who get, or attempt to get, thereon, and if, in so doing, he does not exercise care and caution, but acts wantonly or maliciously, and an injury results, the railroad company is liable without evidence showing the brakeman's authority. (Wash.) Dixon v. Northern Pac. Ry. Co., 810.

Interference with Waters.

5. **RAILROADS—Discharge of Surplus Water.**—A railroad company has the right to lower the grade of its tracks, and to dig ditches to convey water off its right of way, but not to turn it upon the lands of an adjoining owner. That the act of constructing the ditches was lawful and was performed with care makes no difference. (Ind. App.) Baltimore etc. R. R. Co. v. Quillen, 183.

6. **RAILROADS—Discharge of Surface Water.**—If the owner of lands collects surface water in a body, he is bound to provide a means of discharge by drainage and if he fails to do so the owner of lower lands has a cause of action. This rule is as applicable to railroad companies as to individuals. (Ind. App.) Baltimore etc. R. R. Co. v. Quillen, 183.

7. **RAILROADS—Discharge of Surplus Water.**—A railroad company has no right to collect surplus water on its right of way, though properly acquired, and discharge it in a body on the lands of an adjoining owner. Such damages as result from such discharge of water are not included in the price paid for the right of way. (Ind. App.) Baltimore etc. R. R. Co. v. Quillen, 183.

8. **OVERFLOW WATERS—Obstruction by Railroad.**—The failure of a railroad company to make culverts in its embankments of sufficient capacity to permit the overflow water from an adjacent river to rise and fall with the stream, is negligence, creating a liability to a property owner thereby injured. (W. Va.) Uhl v. Ohio River R. R. Co., 968.

See Carriers.

Note.

Railways, release of claims for damages against in consideration of agreement for employment, 617-620.

RECEIVER.

See Executions, 3; Mortgages, 3.

RECORDS.

See Notice.

RELEASE.

1. **DAMAGES—Release of Claim—Consideration.**—A release by an injured employé of his claim for damages in consideration of his re-employment, there being no promise to re-employ, wants consideration and cannot be enforced. (Tex.) *Missouri etc. Ry. Co. v. Smith*, 607.

2. **DAMAGES—Release of Claim—Consideration—Re-employment.** A promise to re-employ an injured employé "for such time only as may be satisfactory," followed by actual re-employment and the payment of wages, is not a sufficient consideration for the employé's release of a claim for damages arising prior to his re-employment. (Tex.) *Missouri etc. Ry. Co. v. Smith*, 607.

Note.

Release by passenger of claims against railway companies, validity of, 615.

by servant in consideration of employment, certainty of, when sufficient, 617.

by servant in consideration of employment for an indefinite term, 618.

by servant in consideration of employment for time certain, however short, 616, 617.

by servant in consideration of steady employment, 617.

by servant of claims for negligence in consideration of payment of doctor's bill, 615, 619.

by servant of claims for negligence in consideration of promise of employment, 616.

by servant of claims for negligence in consideration of payment of wages due, 616.

by servant of claims for negligence, validity of, 615.

by servant of claims for negligence, when will not be set aside, 615.

REMAINDERS.**In General.**

1. **REMAINDER, When a Legal and not an Equitable Estate.**—If a conveyance is made to a trustee in trust to one for life and after the death of the life tenant to such child or children as she may leave, the remainder is a legal, and not an equitable estate. (Ga.) *Smith v. McWhorter*, 85.

2. **REMAINDERS, Contingent—Assignment of.**—The assignment of a contingent remainder where the person who is to take is certain, though the consideration for the assignment is nominal, vests the equitable title in the assignee from the time of the assignment, whose title, on the happening of the contingency, requires nothing further to perfect it. (N. C.) *Kornegay v. Miller*, 505.

Adverse Possession.

3. **REMAINDERMEN—Limitation of Actions.**—The right of action of remaindermen does not accrue until the death of the life tenant, and possession cannot be adverse to them prior to the accruing of their cause of action. (Ga.) *Smith v. McWhorter*, 85.

4. REMAINDERS—Limitation of Actions.—Where a Life Tenant Assumes to Make a Sale of the Property, the remaindermen who do not participate are not bound to proceed against the purchaser or give him notice until the accrual of their cause of action. (Ga.) *Smith v. McWhorter*, 85.

See Trusts, 2, 3.

REPLEVIN.

ESTOPPEL to Attack Validity of Legal Process.—A statutory provision that no writ of replevin shall issue until a sufficient recognizance with surety has been taken by "the authority" signing the writ," is intended for the sole benefit of the defendant. An unsuccessful plaintiff in replevin, who has seized goods belonging to the defendant, is estopped together with his surety, in an action upon the recognizance, from alleging, or being benefited by, the fact that it was entered into before a magistrate other than the one who signed the writ of replevin. (Conn.) *Douglass v. Unmack*, 25.

See Costs, 4.

RES GESTAE.

See Evidence, 16, 17.

RES JUDICATA.

See Judgments.

RESTRAINT OF ALIENATION.

See Deeds, 3-5.

REWARDS.

1. REWARDS.—To be Entitled to Recover a Reward, one must establish a substantial compliance with all the provisions of the offer of reward. (Mo.) *Smith v. Vernon County*, 324.

2. REWARDS—Conviction, When not Necessary to Recovery of. Under a statute authorizing an offer of reward for the arrest and apprehension of a person committing a crime, a person claiming the reward has no duty resting on him of convicting the person arrested, though the reward cannot be paid until such conviction and the offer of the reward purports to be for arrest and conviction. (Mo.) *Smith v. Vernon County*, 324.

3. REWARD.—The Claiming and Receiving of Witness' Fees for Attendance at the Trial does not militate against the right to recover a reward for the arrest and conviction of the person testified against. (Mo.) *Smith v. Vernon County*, 324.

4. REWARD, Compliance with Offer for, What Amounts to.—If an offer of reward is published for the apprehension and conviction of the murderer of P., one is entitled to such reward who discloses the whereabouts of the accused, and going there, arrests him on suspicion, causes him to be confined pending inquiry, and reports to the sheriff of the county where the crime was committed, whereby such sheriff is induced to come and claim the person so arrested and take him to the county where he is subsequently convicted. It is not necessary that the claimant of the reward should have conducted the prosecution of the accused, or have furnished evidence on which his conviction was secured. (Mo.) *Smith v. Vernon County*, 324.

5. **REWARD—Public Officers, When may Recover.**—A Policeman of a municipality is not under any duty to ferret out and hunt up persons committing crimes in another state, and may, therefore, recover a reward offered by the proper authorities of another state for the apprehension of a person who has committed a crime therein, and having become a fugitive from justice, is found and apprehended by such policeman within the limits of the latter's state. (Mo.) *Smith v. Vernon County*, 324.

6. **REWARD, Necessity of Knowledge of Offer of.**—Though an offer of a reward for the arrest of a person accused of crime has been made and published, one effecting such arrest without knowledge of, or reliance upon, such offer cannot recover. (Mo.) *Smith v. Vernon County*, 324.

RIPARIAN RIGHTS.

See Waters and Watercourses.

SALES.

Conditional Sales.

1. **CONDITIONAL SALE** Contracts are Valid not only as between the parties, but, in the absence of fraud, as to third persons, and they are not required to be recorded. (Utah) *Freed Furniture etc. Co. v. Sorensen*, 731.

2. **CONDITIONAL SALE.**—An Absolute Promise by a Vendee to Pay is not inconsistent with a conditional sale. (Utah) *Freed Furniture etc. Co. v. Sorensen*, 731.

3. **A CONDITIONAL SALE** is a Sale in which the transfer of title to the purchaser, or his retention of it, is made to depend upon the performance of some condition. (Utah) *Freed Furniture etc. Co. v. Sorensen*, 731.

4. **CONDITIONAL SALE—Resale After Default.**—If a contract for the sale of goods reserves the title in the seller until they are fully paid for, a provision that upon default by the buyer the seller may take possession of the goods, sell them, and, after applying the proceeds on the balance due, hold the residue, if any, subject to the disposal of the buyer, does not deprive the transaction of its character as a conditional sale. (Utah) *Freed Furniture etc. Co. v. Sorensen*, 731.

5. **CONDITIONAL SALE—Renewal Notes.**—Where contract notes given at the time of the delivery of goods, evidence a conditional sale, the transaction is not converted into an absolute sale when the parties subsequently adjust their accounts, and a new note, similar to the original ones, is given to facilitate the keeping of the accounts, the old ones not being surrendered. (Utah) *Freed Furniture etc. Co. v. Sorensen*, 731.

Warranties.

6. **CONTRACTS—Warranties—Authority of Agent.**—If a contract of sale is in writing and contains no express warranty, the question whether the vendor's agent who made the contract had authority to bind his principal by warranty is immaterial. (Wis.) *Northern Supply Co. v. Wingard*, 984.

7. **CONTRACTS—Warranty—Representations of Agent.**—If a contract of sale is in writing and contains no express warranty, the question whether certain representations made by an agent at the time

that he made the contract were statements of fact or mere expressions of opinion is immaterial. (Wis.) Northern Supply Co. v. Wingard, 984.

8. **CONTRACTS—Warranty in Sales of Goods.**—In a contract for the sale of a quantity of “good” potatoes, there is no implied warranty that the potatoes furnished will be fit for the purpose for which they were bought, and the only implied warranty is that the potatoes delivered will be of good merchantable quality, and free from latent defects not discoverable by ordinary attention on the part of the purchaser. (Wis.) Northern Supply Co. v. Wingard, 984.

Inspection of Goods.

9. **SALES—Inspection of Goods.**—If there is nothing in a written contract for the sale of potatoes as to whether they were to be inspected and accepted or rejected upon their delivery to the purchaser, it is error to submit an issue on that question to the jury, and to instruct it to apply to the matter any special knowledge which it may possess. (Wis.) Northern Supply Co. v. Wingard, 984.

10. **SALES—Inspection of Goods.**—Upon the question whether a person of ordinary intelligence exercising ordinary care, by inspecting property purchased upon its delivery, could have determined whether it was of the kind and quality agreed upon, an instruction that the purchaser “would not be required to look at the whole mass in the car, or to look at them other than in a fair and reasonable way,” invades the province of the jury, and is erroneous. (Wis.) Northern Supply Co. v. Wingard, 984.

Defective Goods—Damages—Duty of Buyer.

11. **SALES—Delivery of Defective Goods—Damages.**—Under a contract for the sale of “good” potatoes to a retail grocer, the seller is chargeable with knowledge that the potatoes were likely to be mixed with others, and, if of an inferior quality and liable soon to decay, would injure such others, and he is liable for such injury resulting from the delivery of potatoes of an inferior quality. (Wis.) Northern Supply Co. v. Wingard, 984.

12. **SALES—Delivery of Defective Goods.—General Damages** for breach of a contract of sale, by the delivery of goods inferior to those called for by the contract, are limited to the difference between the market value of the property delivered at the time and place of the delivery, and the value at such time and place the property would have possessed had it been according to contract, and a special verdict which fails to find such difference in value is fatally defective. (Wis.) Northern Supply Co. v. Wingard, 984.

13. **SALES—Breach of Contract—Liability for Loss.**—A seller of potatoes who delivers a grade inferior to that agreed upon is not liable for any loss which the purchaser could have prevented by the exercise of ordinary care. (Wis.) Northern Supply Co. v. Wingard, 984.

14. **SALES—Liability of Purchaser—Duty to Avoid Loss.**—If a purchaser of potatoes places them with others owned by him, and upon discovering a short time afterward that the last purchased potatoes were decaying and ruining the whole lot, does nothing save sort a few from time to time for his retail trade until the whole lot is decayed, the cost of such sorting is not the basis of damage, but the reasonable cost of removing the last purchased potatoes on discovering their condition is the extent of the purchaser's damage on such score. (Wis.) Northern Supply Co. v. Wingard, 984.

15. **SALES, Liability of Purchaser.**—Evidence of the best method of handling potatoes after they begin to decay is material as tending to show whether the purchaser of the potatoes exercised ordinary care to prevent unnecessary loss. (Wis.) Northern Supply Co. v. Wingard, 984.

Evidence in Action for Breach of Contract.

16. **SALES—Evidence.**—If a contract for the sale of potatoes is in writing, evidence of oral statements as to how long the potatoes would keep is immaterial. (Wis.) Northern Supply Co. v. Wingard, 984.

17. **SALES—Breach of Contract—Evidence.**—If a written contract for the sale of potatoes does not specify what kind of soil they shall be produced in, evidence of the kind of soil in which they were grown is inadmissible. (Wis.) Northern Supply Co. v. Wingard, 984.

SCHOOL TEACHERS.

See Garnishment, 4.

SEARCHER OF RECORDS.

See Abstracter of Titles.

SHELLEY'S CASE.

See Wills, 3, 4.

SPENDTHRIFT TRUSTS.

See Trusts, 4-6.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Construction of Law of Another State.

1. **STATUTES of Another State—Construction of.**—In the absence of the construction of the statute of one state by the courts of that state, it is the duty of the courts of another state to construe such statute according to the rules applicable to the construction of the statutes of their own state. (Wash.) Clark v. Eltinge, 858.

Title of Act.

2. **CONSTITUTIONAL LAW—Title of Statute—More Than One Purpose.**—A statute, the caption and body of which provide only for the general subject of a water supply for various industries, does not embrace more than one subject within the meaning of constitutional provisions. (Tex.) Borden v. Trespacios Rice etc. Co., 640.

3. **CONSTITUTIONAL LAW—Subject of Statute—Eminent Domain.**—A statute providing generally a method for the acquisition and a means for the conveyance of water authorized for use in various industries named therein, necessarily includes the exercise of the right of eminent domain, in the acquisition of rights of way for canals and

ditches, although the exercise of such right is not mentioned in the caption, nor in the body of the statute. (Tex.) *Borden v. Trespacios Rice etc. Co.*, 640

See Evidence, 4, 5.

STREET RAILWAYS.

1. **STREET RAILWAYS—Passenger—Who is.**—A person with a transfer ticket at a usual transfer point on a street railway, and with his foot on the steps of a car and his hand on the vestibule rod in the act of boarding the car, is a passenger, and entitled to recover if injured by the negligent starting of such car. (N. C.) *Clark v. Durham Traction Co.*, 526.

2. **STREET RAILWAYS—Duty of Conductor—Sudden Starting—Negligence.**—If a street-car has stopped for the reception of passengers, or if an intending passenger has signaled it to stop, and has put his foot upon the step of the car in the act of getting on, and is injured by the sudden starting of the car, he has a right to damages for his injury, whether the car employes starting the car knew that he was in the act of getting on or not. (N. C.) *Clark v. Durham Traction Co.*, 526.

3. **STREET RAILWAYS—Duty of Conductor—Negligence.**—The conductor of a street-car is bound to know when he starts his car suddenly and with full force, that no person is attempting to embark and in a position of danger, and intending passengers must be safely on board before the conductor gives the signal to start. A failure to perform this duty is negligence, and the passenger is entitled to damages if he is thrown down and injured by the premature starting of the car. (N. C.) *Clark v. Durham Traction Co.*, 526.

4. **STREET RAILWAYS.—Persons Sick or Lame, or Children and Aged Persons** are entitled to more care and attention from those in charge of a street-car, than those in full possession of their strength and faculties. They should be allowed more time in which to get on and off the car, and to secure a safe position therein. (N. C.) *Clark v. Durnham Traction Co.*, 526.

5. **STREET RAILWAYS—Negligence—Personal Injury—Measure of Damages.**—A passenger on a street-car injured through the negligence of the railway company's employes is entitled to recover for actual suffering of mind and body, actual nursing and medical expenses, and for loss of time or loss from inability to perform ordinary labor, or capacity to earn money. (N. C.) *Clark v. Durham Traction Co.*, 526.

6. **STREET RAILWAYS—Minors.—Negligence** of a motorman on a street-car in requiring a boy ten years of age to leave the car while in motion renders the railway company liable for resulting injury, though permission to the boy to enter the car is granted by such motorman to subserve his own purpose, and not in transacting the business of the company. (Tex.) *Denison etc. Ry. Co. v. Carter*, 626.

7. **STREET RAILROADS—Minors—Negligence—Proximate Cause.** The act of a motorman in permitting a minor to ride on the front platform of a street-car, conceding that to be a dangerous place, is not the proximate cause of an injury received in jumping from the car while in motion at the command of the motorman. The act of jumping from the car is the proximate cause of the injury. (Tex.) *Denison etc. Ry. Co. v. Carter*, 626.

8. **STREET RAILWAYS—Minors.**—Doctrine of Turntable Cases as to liability for permitting children to be about dangerous machinery is inapplicable to the mere act of allowing children to get upon any part of street-cars fitted up and used for the conveyance of all ages and classes of persons. (Tex.) *Denison etc. Ry. Co. v. Carter*, 626.

9. **STREET RAILWAYS—Minors—Evidence of Contributory Negligence.**—If a boy, ten years of age, is injured in jumping from a street-car while it is in motion, a city ordinance making it a misdemeanor to jump from moving cars is admissible in evidence as bearing upon the question of contributory negligence. (Tex.) *Denison etc. Ry. Co. v. Carter*, 626.

10. **NEGLIGENCE—Burden of Proof.**—If it appears that the plaintiff while riding in one of the defendant's cars, which was struck by another of defendant's cars, was injured, the burden of accounting for the collision must be assumed by the defendant. (Mo.) *Reynolds v. Transit Co.*, 360.

11. **STREET RAILWAYS, Passengers, Who Presumed to be and to Have the Rights of—Payment of Fare.**—If it appears that the plaintiff boarded one of the defendant's cars, and rode therein to the place where it collided with another of the defendant's cars to the plaintiff's injury, the presumption arises, though the payment of fare is not proved, that he was there under an implied contract creating between him and the railway company the relation of passenger and carrier. (Mo.) *Reynolds v. Transit Co.*, 360.

STRIKES.

See Conspiracy.

SUMMONS.

See Process.

SUPPLEMENTARY PROCEEDINGS.

See Executions.

TENANTS IN COMMON.

See Partition; Waste.

THREATS.

See Criminal Law, 3.

TIME.

1. **TIME—First and Last Days.**—In the computation of time fractions of a day are not reckoned; and when an act is required by a contract to be done within a specified period from or after a particular day, the general rule is to exclude the day thus designated and to include the last day of the specified period. (Utah) *Tilton v. Sterling Coal etc. Co.*, 689.

2. **TIME—Fractions of Day.**—Since the Law Rejects fractions of a day, when an act is required by a contract to be performed on a specified day its performance is not referable to any particular portion of that day, but may be performed at any period within its compass. (Utah) *Tilton v. Sterling Coal etc. Co.*, 689.

3. TIME.—If a Lease which Grants an Option to purchase on its expiration expires on the first day of the month, the lessee has the right to accept the option at any time during that day, but not on any day thereafter. (Utah) *Tilton v. Sterling Coal etc. Co.*, 689.

TORTS.

See Parent and Child.

TRADES UNIONS.

See Conspiracy.

TREES IN HIGHWAY.

See Municipal Corporations, 14, 15.

TRIAL.

Demurrer to Evidence.

1. ON A DEMURRER to the Evidence the Court will Consider the whole evidence as though on a verdict in favor of the demurrees, and will not reverse the judgment unless the evidence is insufficient to sustain the same. (W. Va.) *Wilson v. Braden*, 927.

Instructions.

See Criminal Law, 4-6.

2. TRIAL—Charge of Court.—If a judge drops a word or expression, in the course of a long charge, contrary to its whole theory, and so plainly error as to force the impression of inadvertence, it is plainly the duty of counsel to call attention to it, and not let it pass in reliance upon a general exception in the event of an adverse verdict, and in the latter event advantage cannot be taken of such inadvertence. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

3. TRIAL—Instructions.—If instructions, taken as a whole, correctly state the law, and there is no fair ground to say that the jury was misled thereby, they ought to stand, although they contain some expression that, if taken alone, would be error. (Vt.) *Patch Mfg. Co. v. Protection Lodge*, 765.

4. INSTRUCTIONS.—If the Court Incorporates in its instructions to the jury the substance of those offered by the plaintiff, it is not error to refuse to adopt those submitted by him. (Mont.) *Paxton v. Woodward*, 416.

5. INSTRUCTIONS.—The Practice of Setting Forth in instructions to juries a clear and concise statement of the nature of the case and the issues to be determined is to be commended, and the instructions are not objectionable. (Mont.) *Paxton v. Woodward*, 416.

TRUSTS.

In General.

1. TRUST, When Becomes Executed by the Married Woman's Act. Under a deed executed after the married woman's act of 1886, purporting to convey property to a designated grantee in trust for M. A. S., a married woman, and on her decease for such child or children or representatives of child or children born of her and her husband as she may have, the trust was executed on the delivery of the deed, and the complete title to the life estate vested in M. A. S. (Ga.) *Smith v. McWhorter*, 85.

2. **TRUSTEE, When does not Represent Remaindermen.**—Where a conveyance purports to convey property to be held in trust for a married woman and, after her death, for her child or children, the estate in remainder is a legal estate, which the trustee does not represent, and an order of sale made on his application is void. (Ga.) *Smith v. McWhorter*, 85.

3. **TRUST, When does not Extend to Estate of Remainderman.**—If there is no need of a trustee to protect and preserve the interest of those who are to take by way of remainder, a trust will be limited to the life estate. (Ga.) *Smith v. McWhorter*, 85.

Spendthrift Trust.

4. **A SPENDTHRIFT TRUST is One** created for the maintenance of the cestui que trust and to secure the fund against his improvidence. (Mo.) *Kessner v. Phillips*, 368.

5. **IN ORDER TO CREATE A SPENDTHRIFT TRUST These Requisites Must be Observed:** 1. The gift to the donee must be of the income only; 2. The legal title must be vested in the trustee; 3. The trust must be an active one, not a mere dry trust which may be executed under the statute of frauds. (Mo.) *Kessner v. Phillips*, 368.

6. **SPENDTHRIFT TRUST, When not Created.**—A conveyance of property by way of gift to a designated grantee on the condition that the property shall not be liable to any debts which he may contract within thirty years, and providing that he shall have no power to sell or encumber for the same period, and that if he should attempt to sell or encumber within that time, the title shall immediately vest in the grantors, does not create a spendthrift trust. (Mo.) *Kessner v. Phillips*, 368.

VARIANCE.

See Attachment.

Note.

Vendor and Purchaser of Real Property, action for possession by the former cannot be maintained after conveying, 723.

default of the latter, action by former for possession after, 722.

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possession, right of vendor to maintain actions for, 722.
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VENDOR AND VENDEE.

Option to Buy.

1. **OPTION.**—The Acceptance of a Formal and carefully prepared option for the sale of land, within the time by it allowed, and according to its terms, although accompanied by a request for a departure from its terms as to the time and place of performance, is an unconditional acceptance, and converts the option into an executory contract of sale, provided the request is not so worded as to limit or qualify the acceptance. (W. Va.) *Turner v. McCormick*, 904.

2. **OPTION.**—A Conditional Acceptance of an Option to purchase amounts to a practical rejection of it. (Utah) *Tilton v. Sterling Coal etc. Co.*, 689.

3. **OPTION—Consideration—Acceptance and Withdrawal.**—Where an option is given a lessee to purchase the premises, the lease is a sufficient consideration to support the option, and the lessor cannot withdraw it before the time given in which to accept it has expired; but when the time for acceptance is specified, the option, if not accepted at that time, terminates if no further time is granted. (Utah) *Tilton v. Sterling Coal etc. Co.*, 689.

4. **OPTION—Nature of Option to Purchase.**—While an option to purchase, if based on a consideration, binds the person granting it, it is not a contract of purchase until acceptance, but it is simply a contract granting a privilege to purchase and binding the grantor to convey the property only when the terms are accepted and complied with. (Utah) *Tilton v. Sterling Coal etc. Co.*, 689.

Fraud by Vendor.

5. **VENDOR AND PURCHASER—False Representation as to Location of Land.**—A false representation by the vendor as to the precise location of land sold and conveyed, relied and acted upon by the vendee, entitles the latter to recover his damages, although the vendor acted in good faith and the false representation arose through mistake. (Wash.) *Lawson v. Vernon*, 880.

6. **VENDOR AND PURCHASER—Misrepresentation as to Location of Land Conveyed—Measure of Damages.**—False representations made by a vendor and relied upon by the vendee, as to the precise location of land conveyed, whether made with or without knowledge of their falsity entitle the vendee to recover such damages as have naturally and proximately resulted from such wrongful act. (Wash.) *Lawson v. Vernon*, 880.

7. **VENDOR AND PURCHASER—Misrepresentation as to Location of Land Conveyed—Measure of Damages.**—If a vendor misrepresents the precise location of land conveyed, and the vendee relying thereon takes possession of the wrong land pointed out to him by his vendor as the land conveyed, and makes improvements thereon, he is, upon discovering the mistake entitled to recover as his damages such sum as will compensate him for his labor and expense caused by such misrepresentation, no matter if the property purchased was more valuable than that occupied and improved. (Wash.) *Lawson v. Vernon*, 880.

8. **VENDOR AND PURCHASER.**—False representations on the part of a vendor are not actionable even though relied upon by the vendee, if the means of knowledge was as open to the vendee as it was to the vendor. (Wash.) *Lawson v. Vernon*, 880.

9. **VENDOR AND PURCHASER.**—Representations of Vendor—Right to Rely Upon.—If land is overgrown with brush and trees and the survey stakes are destroyed, the vendee has a right to rely upon the representations of the owner in pointing out certain land as that which he offers for sale. (Wash.) *Lawson v. Vernon*, 880.

Ejectment by Vendor.

10. **EJECTMENT by a Vendor Against His Vendee.**—Where a vendee takes possession of property under a contract of purchase and pays a portion of the price, the vendor cannot maintain ejectment against him for a failure to pay the balance, if the contract does not provide that time is of the essence, nor stipulate that a forfeiture will arise from a default in payment, and there is no rescission, repudiation, nor abandonment of the contract. (Utah) *Brixen v. Jorgensen*, 720.

See Frauds, Statute of; Notice.

VISITATION.

See Corporations, 51-53.

WARRANTY.

See Sales, 6-8.

WASTE.

1. **COTENANCY—Waste—Injunction.**—If a cotenant is guilty of malicious waste tending to the destruction of the chief value of the property, his cotenant is entitled to an injunction restraining it. (Miss.) *Leatherbury v. McInnis*, 274.

2. **COTENANCY—Waste—Injunction.**—If one cotenant is guilty of waste in proceeding to destroy the timber on the common property, which constitutes its chief value, his cotenant is only entitled to an injunction restraining him from destroying more than one-half of such timber in value and quantity, in the absence of proof that the timber on one part of the tract is of more value than that on any other part. (Miss.) *Leatherbury v. McInnis*, 274.

WATERS AND WATERCOURSES.

Riparian Rights and Lands.

1. **WATERS—Riparian Rights and Lands.**—Riparian rights arise out of the ownership of lands through or by which a stream of water flows, but such rights cannot extend beyond the original survey as granted by the government. (Tex.) *Watkins Land Co. v. Clements*, 653.

2. **WATERS.**—Riparian Land is restricted to that the title to which is acquired by one transaction. (Tex.) *Watkins Land Co. v. Clements*, 653.

3. **WATERS—Riparian Rights.**—A riparian owner cannot ordinarily divert water to land lying beyond the watershed of the stream. (Tex.) *Watkins Land Co. v. Clements*, 653.

4. **WATERS—Riparian Rights.**—Each riparian owner has equal rights in the stream of water which flows by him, and the use by

each must be reasonable as regards the rights of others, and courts have ample authority to ascertain the relative rights of riparian owners and to regulate the manner of using the water. (Tex.) *Watkins Land Co. v. Clements*, 653.

Irrigation.

5. **WATERS—Riparian Rights—Irrigation—Prescription.**—A right of one riparian proprietor to appropriate the water of a stream for irrigation to the exclusion of the irrigation rights of another riparian owner may be acquired by prescription. (Tex.) *Watkins Land Co. v. Clements*, 653.

6. **WATERS—Riparian Rights—Irrigation—Prescription.**—A riparian owner cannot acquire exclusive irrigation rights by limitation against his grantor, who expressly reserves in the deed all riparian rights belonging to him and especially provides that the conveyance shall in no wise affect his rights as a riparian owner. (Tex.) *Watkins Land Co. v. Clements*, 653.

7. **WATERS—Riparian Rights—Irrigation.**—Subject to the right of natural use by other riparian owners, each riparian owner is entitled to use the water of a stream, which flows by or through his land, for the purposes of irrigation, provided such use is reasonable considering all the circumstances and conditions under which it is made. (Tex.) *Watkins Land Co. v. Clements*, 653.

8. **WATERS—Riparian Rights—Irrigation and Lands.**—The rule that the use of water by one riparian owner must be reasonable as against the rights of other riparian owners, applies to lands within arid regions as well as others, and irrigation does not become a natural use of the water because the land is arid. (Tex.) *Watkins Land Co. v. Clements*, 653.

9. **WATERS—Riparian Rights—Nonriparian Lands.**—A riparian owner has no right to appropriate the water of the stream flowing through or by his land, to the irrigation of nonriparian land, owned by him, although it may join riparian land, nor has he any right to sell the water to others to irrigate lands not riparian. (Tex.) *Watkins Land Co. v. Clements*, 653.

Overflow—Waters of Stream.

See Railroads, 5-8; Nuisance, 10-13.

10. **OVERFLOW WATERS—Whether Part of Stream.**—The overflow waters of a river at times of ordinary flood, whether standing motionless upon the adjacent land or sweeping over it, do not cease to be a part of the stream, unless so separated from it as to prevent their return. (W. Va.) *Uhl v. Ohio River R. R. Co.*, 968.

Surface Waters.

See Railroads, 5-8; Nuisance, 10-13.

11. **SURFACE WATER.**—The Owner of Property may consume the surface water of his premises, or obstruct or divert the flow of it, without incurring any liability to his neighbors, whether above or below him, although they may be injured by the act, provided the interference does not amount to a collecting of the water on his own land into a body and discharging it as such upon his neighbors' premises. (W. Va.) *Uhl v. Ohio River R. R. Co.*, 968.

12. **WATERS—Surface—Control of.**—The owner of land may withhold the water falling upon his land from passing onto that of his neighbor, and in the same manner may prevent the water falling

on the land of the latter from coming onto his own land. (Tex.) *Barnett v. Matagorda Rice etc. Co.*, 636.

13. **WATERS—Surface.—Right to Discharge** water falling on one's own land onto the land of another or to receive the water falling on the latter's land can have no legal existence except from a grant express or implied. (Tex.) *Barnett v. Matagorda Rice etc. Co.*, 636.

14. **WATERS—Surface—Obstructing Flow of.**—The owner of land may erect along his boundary lines and upon his own premises, an irrigation ditch with an embankment which prevents the escape of the surface water from the land of an adjoining owner without liability to the latter for so doing. (Tex.) *Barnett v. Matagorda Rice etc. Co.*, 636.

Percolating Water.

15. **WATERS—Percolating—Right to.**—The owner of land has the right to collect by means of wells, and to use without limitation as to amount, waters percolating beneath his land, although he thereby drains the well of an adjoining owner to the injury of the latter. (Tex.) *Houston etc. R. R. Co. v. East*, 620.

16. **WATERS—Percolating—Right to.**—The owner of land can use all the water he can obtain thereon by digging wells which are supplied by water percolating through the soil, provided such wells are not dug for the purpose of maliciously injuring adjoining proprietors, and this though such owners may be entirely deprived of water which would otherwise have percolated into their own land. (Tex.) *Houston etc. R. R. Co. v. East*, 620.

WEAPONS.

TRAVELERS—Carrying Concealed Weapons.—A person, who comes into a town for a stay of indefinite duration, cannot set up as a defense to a proceeding against him for carrying concealed weapons, that he is a traveler. His rights as such terminate when he reaches the town and decides to stay therein for an indefinite time. (Miss.) *Rosaman v. Okolona*, 303.

WILLS.

Form and Validity.

1. **WILLS—Construction.**—No Particular Form of Words or expressions is necessary to constitute a legal disposition of property, and although apt legal words are not used, and the language is inartificial, courts will give effect to it, when the intent of the testator is apparent. (N. C.) *Kerr v. Girdwood*, 551.

2. **WILLS.—An Attempted Testamentary Disposition of Property** by an instrument not executed as a will and which cannot be made part of it, and without disclosing in the will either the purpose of the bequest to a so-called trustee, or the name of the person who is to receive the benefit of the gift, is void and must fail. (Conn.) *Bryan v. Bigelow*, 64.

Rule in Shelley's Case.

3. **SHELLEY'S CASE, Rule of, When Inapplicable.**—If a freehold is given to one person, remainder to the heirs of the body of that person and another, and such persons are capable of having a common heir of their bodies, the rule in Shelley's Case does not apply, and such heir takes by purchase a contingent remainder in fee simple, and the original taker receives an estate for life only. (N. C.) *Thompson v. Crump*, 514.

4. **SHELLEY'S CASE**, Rule of, Devise, When does not Fall Within.—A will devising to the testator's son all his lands for and during his life, and after death, to the lawful heirs of such son born of his wife, the words "born of his wife" qualify and explain the words "his lawful heirs," and confine the remainder to the children of that wife, and prevent the operation of the rule in Shelley's Case. (N. C.) Thompson v. Crump, 514.

Incorporation of Extrinsic Document.

5. **WILLS**—Incorporation of Extrinsic Document—Declaration of Trust.—If there is no such clear, explicit reference in the will itself to any specific document as to incorporate a sealed letter found with the will into the will itself, such defective reference cannot be helped by parol evidence, nor can such letter act as a valid declaration of a trust mentioned in the will without disclosing either the name of the beneficiary or the terms of such trust. (Conn.) Bryan v. Bigelow, 64.

6. **WILLS**—Incorporation of Document by Reference.—In order that a document of any nature may become part of a will by reference, it must be in existence at the time of the execution of the will, and the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt as an existing document. (Conn.) Bryan's Appeal, 34.

7. **WILLS**—Incorporation of Document by Reference.—A reference in a will to an extrinsic document, so vague and ambiguous that it may be applied to any one of several documents then or thereafter written, is insufficient to incorporate such document in the will, and cannot be aided by parol evidence. (Conn.) Bryan's Appeal, 34.

8. **WILLS**—Incorporation of Letter by Reference.—If a clause in a will creates a trust "for the purposes set forth in a sealed letter which will be found with this will," the reference to the letter is so vague and ambiguous, that a sealed letter found with the will cannot by reference be incorporated in and become part of it. (Conn.) Bryan's Appeal, 34.

Extrinsic Evidence.

9. **WILLS**—Extrinsic Evidence may be Admitted to Identify the devisee or legatee named, or the property described in the will, or to make clear the doubtful meaning of language used in the will, but is never admissible, however clearly it may indicate the testator's intention, to show an intention not expressed in the will itself, nor for the purpose of proving a devise or bequest not contained in the will. (Conn.) Bryan v. Bigelow, 64.

10. **WILLS**—Evidence.—Resulting trusts created by will which can be rebutted by extrinsic evidence are those claimed upon a mere implication of law, and not those arising on the failure of an express trust for imperfection or illegality. (Conn.) Bryan v. Bigelow, 64.

Declarations of Testator.

11. **WILLS**—Evidence.—Declarations of a Testator to the Effect that He had not Made a Will; that he understood that there was what purported to be a will in G., and that if he had signed any such paper he did not know what he was doing, are admissible, not as evidence of the facts so stated, or of fraud or undue influence, nor of revocation, but as tending to show the state of the testator's mind when the paper purporting to be a will was executed, and whether he then had sufficient capacity to make it, or was in a condition to be easily influenced by others. (Ga.) Credille v. Credille, 157.

Holographs.

12. **WILLS—Holographs.**—A provision in a holographic will that the testatrix wished to regard the desire of her husband as expressed in his last illness, that at her death he wished certain property to be sold and the proceeds divided between his sisters and brothers, is a valid testamentary disposition of such property. (N. C.) *Kerr v. Girdwood*, 551.

Lost Will.

13. **LOST WILL—Presumption of Revocation.**—If the evidence shows that a lost will was last seen in the possession of the testator when he was mentally competent, it is presumed that he destroyed it *animo revocandi*, and the burden of proof is on the proponent to overcome this presumption. (Mont.) *In re Colbert's Estate*, 439.

14. **LOST WILL—Presumption of Revocation.**—The Evidence to Overcome the presumption that a lost will was destroyed by the testator *animo revocandi* must be clear, satisfactory, and convincing. (Mont.) *In re Colbert's Estate*, 439.

15. **LOST WILL—Evidence of Existence.**—Evidence that an alleged witness to a lost will stated at the testator's funeral that he had the will in his pocket does not tend to prove that such was the case, there being no evidence that anyone ever saw it in his possession. (Mont.) *In re Colbert's Estate*, 439.

16. **LOST WILL.**—The Proponent of a Lost Will Must Prove either that the will was actually in existence at the time of the testator's death, or that it is in existence in contemplation of law. (Mont.) *In re Colbert's Estate*, 439.

17. **LOST WILL.**—The Declarations of a Testator to the effect that he was well satisfied with his will are not admissible, in conjunction with the testimony of witnesses who had seen it, to overcome the presumption of revocation which follows from the fact that the will was last seen in his possession when he was mentally sound. (Mont.) *In re Colbert's Estate*, 439.

Contents of Will.

18. **WILL CONTEST—Mode of Procedure.**—Under the Montana statutes, the proponent of a will must first make out a *prima facie* case, that is, make such proof as would entitle the will to probate in the absence of a contest. Then the contestant attacks the validity of the will, the proponent defends it, and the contestant rebuts the testimony of the proponent. The proponent may sur-rebut any new testimony adduced for the first time in rebuttal; but the contestant has the right to open and close the case. (Mont.) *In re Colbert's Estate*, 439.

19. **WILLS—Contest of, Erroneous Reading to Jury of Section of Code.**—If a testator by his last will gives his property to one of his sons and the latter's wife and children, it is prejudicial error on the trial of a contest of such will to read to the jury the section of the code declaring that, when a testator bequeaths his entire estate to strangers to the exclusion of his wife and children, his will should be closely scrutinized, and that upon the slightest evidence of aberration of intellect, or collusion, or fraud, or any undue influence or unfair dealing, probate should be refused. (Ga.) *Credille v. Credille*, 157.

20. **WILLS, Contest, Burden of Proof.**—The burden of proof rests upon the propounders of a will, in the first instance, to show that

it was executed, and the capacity of the testator. A prima facie case must be made out, after which the onus is changed, and the burden of proof is on the caveators, to make their grounds of objection good. (Ga.) Credille v. Credille, 157.

Undue Influence.

21. **WILLS.**—Influence to be Undue and Sufficient to Vitiate a Will must be such as amounts to over-persuasion and coercion or force, destroying the free agency and will and power of the testator. It must not be the influence of affection or attachment, nor the result of a desire on the part of the testator to gratify the wishes of one loved, respected, and trusted by him. (Mo.) Dausman v. Rankin, 391.

22. **WILLS.**—The Burden of Proving Undue Influence is on the party alleging it, but like every other question of fraud or bad faith, it is a question of fact, and can rarely be proved by direct or positive evidence, but must be established by facts and circumstances. (Mo.) Dausman v. Rankin, 391.

23. **WILLS**—Undue Influence, Presumption of from Fiduciary Relation.—Where the beneficiary under a will occupies a fiduciary relation to the testator, undue influence is presumed and is fatal to a bequest unless rebutted by proof of free deliberation and spontaneity on the part of the testator and good faith on the part of the devisee or legatee. (Mo.) Dausman v. Rankin, 391.

24. **WILLS**—Undue Influence—Discrimination Between Children.—While discrimination in favor of one child over another is not evidence of undue influence, yet if that influence does appear, and the favored child prepares the will by which he obtains the bulk of his parent's property, to the detriment of his brothers and sisters, the burden is on him to show that the will was the result of deliberation and spontaneity on the part of the testator and absolute good faith on the part of the favored devisee or legatee. (Mo.) Dausman v. Rankin, 391.

25. **WILLS**—Undue Influence, Verdict of, When Sustainable.—Where the evidence tends to show that before and at the time a will was written the child of the testator favored therein had acquired control of her business and bore a fiduciary relation to her, that he had a strong control over her mind as to the disposition of her property, and that when she desired to aid either of her other children, she sought to keep him from knowing it lest he should raise a disturbance about it, and that she had become possessed of a false notion that one of her sons in law was living off of her estate, and she was in feeble health and of great age, and a will previously made by her had been destroyed by the beneficiary under her last will, and the will in contest had been drawn by him, by which he received the bulk of her estate, and that he was embittered toward his only sister, so that he would not speak to her, and exhibited this unnatural disposition to his mother, and that there was no reason why he should have been preferred over her other children, but many reasons to the contrary, a verdict of undue influence is sustainable. (Mo.) Dausman v. Rankin, 391.

Revocation or Lapse by Divorce.

26. **WILLS**—Legacies—Lapse by Divorce.—A legacy in the words "one-third to my wife," naming her, does not lapse, when such wife after the date of the will, at her own instance, obtains a divorce a vinculo matrimonii from the testator. In such case the words "my

wife'' are only descriptive and do not import a condition that the beneficiary shall remain the wife of the testator. (Pa. St.) Jones' Estate, 581.

27. **WILLS—Legacies—Revocation by Divorce.**—A bequest of a legacy "to my wife" is not revoked by implication by her subsequently obtaining an absolute divorce at her own instance from the testator. (Pa. St.) Jones' Estate, 581.

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WITNESSES.

- 1. WITNESSES—Competency of Infant.**—The substantial test of the competency of an infant witness is his intelligence, and his comprehension of an obligation to tell the truth; and if a full and present understanding of an obligation to tell it is shown by the witness, that is sufficient. (Pa. St.) Commonwealth v. Furman, 594.
- 2. WITNESSES—Competency of Infant.**—A boy eight years of age is competent as a witness if it appears that he clearly comprehends the difference between truth and falsehood, that the truth is what is demanded of him, and that punishment will follow the telling of a falsehood while he is a witness. (Pa. St.) Commonwealth v. Furman, 594.

See Evidence.

WORDS AND PHRASES.

- 1. "MAY," Use of in Instruction.**—An instruction that the jury may allow the plaintiff for the diminished earning capacity that may be occasioned by his injury will not be held prejudicial or erroneous, on the ground that it authorized the jury to allow for damages which it is not reasonably certain will result from the injury. Though a safer word might have been used, the instruction will not be held erroneous, where the context, in the light of the facts of the case to which the instruction applies, shows that it was used to import rea-

sonable probability or reasonable certainty. (Mo.) Reynolds v. Transit Co., 360.

2. **PRIVIES** are Persons Connected together or having mutual interest in the same action or thing by some relation other than that of actual contract between them. (Mont.) Western Loan etc. Co. v. Silver Bow Abstract Co., 435.

WRIT OF ERROR CORAM NOBIS.

See Criminal Law, 7, 8.

WRIT OF NE EXEAT.

See Divorce.

3.
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